

The hearing in the above-entitled matter  
came on, pursuant to notice, at 9:35 a.m. before:  
V.V. VEEDER, Q.C., President  
PROF. W. MICHAEL REISMAN, Arbitrator  
J. WILLIAM ROWLEY, Q.C., Arbitrator

Also Present:

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Tribunal Legal Secretary

MARGRETE STEVENS,  
Senior ICSID Counsel  
Tribunal Administrative Secretary

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1 P R O C E E D I N G S

2 PRESIDENT VEEDER: Good morning, ladies  
3 and gentlemen. This is day two of the main  
4 hearing, and under our schedule it's now for the  
5 United States to make its oral submissions, and we  
6 hand the floor over to you, Mr. Taft.

7 OPENING STATEMENTS BY COUNSEL FOR RESPONDENT/PARTY

8 MR. TAFT: Thank you, Mr. President.

9 Mr. President, members of the Tribunal,  
10 it's my privilege to open the United States's  
11 presentation of its case-in-chief at this hearing,  
12 and I speak on behalf of the entire U.S. team  
13 arrayed to my right in saying that we are honored  
14 to appear before you today.

15 This morning I will make some general  
16 remarks and provide an overview of the U.S.  
17 presentation and then summarize how we intend to  
18 divide the presentation among the members of our  
19 team. I regret that I will not be able to stay  
20 with you during the course of the day. In fact, I  
21 have to leave right after.

1           There seem to be two hearings this week in  
2 Washington that have not been cancelled as a result  
3 of President Reagan's ceremonies, and this is one,  
4 and the other is the hearing of the Senate Select  
5 Committee on Intelligence on the Law of the Sea  
6 Treaty at which I'm scheduled to testify, so I will  
7 have to go and attend to that, but I'm glad to be  
8 able to start off here.

9           In its first pleading in this case, the  
10 statement of defense of August 2000, the United  
11 States stated that, and I quote, Methanex's claim  
12 does not remotely resemble the type of grievance  
13 for which the state parties to the NAFTA created  
14 the investor-state dispute resolution mechanism of  
15 Chapter 11, unquote.

16           Several years have passed, and many pages  
17 of pleadings and evidentiary materials have been  
18 prepared and filed since then, but the passage of  
19 time has only served to underscore the fact that  
20 Methanex's claims, no matter how recast or recast,  
21 do not fit the NAFTA's investment chapter. They're

1 not the kind of claims that the parties  
2 contemplated would be subject to the jurisdiction  
3 of investor-state dispute resolution panels, and  
4 they are not, on their merits, entitled to any of  
5 the remedies of Chapter 11.

6           First, Methanex's claims do not fall  
7 within the scope of Chapter 11. As a result, this  
8 Tribunal does not have jurisdiction to resolve  
9 them. Article 1101(1) of the Treaty provides that  
10 Chapter 11 only applies to those of a party's  
11 measures relating to, first, investors of another  
12 party; or two, the investments of those investors  
13 in the territory of the first party. I understand  
14 that yesterday Methanex did not address this issue  
15 directly, suggesting that it would come to  
16 jurisdictional issues only in its closing. For the  
17 moment, it only put forward its belief that the  
18 challenged measures related to Methanex and  
19 methanol. But the measures Methanex complains of  
20 relate to a product, MTBE, that Methanex doesn't  
21 manufacture and in the production of which it has

1 made no investment at any time.

2           As the First Partial Award in this case  
3 held, this ban could not be said to relate to  
4 Methanex or relate to its investments within the  
5 meaning of Article 1101(1) under the facts alleged  
6 in Methanex's written pleadings.

7           In our presentation, we will show that  
8 Methanex's points have no merit. The Tribunal did,  
9 in its First Partial Award, leave a narrow  
10 jurisdictional window open to Methanex. It held  
11 that if Methanex could prove that the measures it  
12 challenges were intended to harm foreign methanol  
13 producers, including Methanex and its investments  
14 in this country, then it could make its case on the  
15 merits. The First Partial Award thus declined to  
16 dispose of the case on the pleadings based on  
17 Methanex's representation that it could prove that  
18 by banning MTBE, California secretly intended to  
19 harm methanol producers. All of the evidence is  
20 now in, however, and that evidence falls far short  
21 of showing such an intent.



1           The evidence submitted by Methanex  
2 consists, in major part, of opinion pieces  
3 published in petrochemical industry newsletters,  
4 uncorroborated double hearsay statements by  
5 interested witnesses, sheer speculation about what  
6 must have been discussed at a dinner meeting with  
7 gubernatorial candidate Davis, and a series of  
8 expert reports and witness statements that provide  
9 unsupported post hoc criticisms of California's  
10 policy decision to ban MTBE, reports and statements  
11 that were not available to California decision  
12 makers at the time that the measures in question  
13 were adopted.

14           Far from establishing any secret intent to  
15 harm methanol producers, the record shows that  
16 California's intent in banning MTBE was precisely  
17 what the measures said it was: To protect  
18 California's public water resources from MTBE's  
19 contaminating effects on the taste and the smell of  
20 drinking water.

21           In light of this failure of proof, the

1 holdings of the First Partial Award, therefore,  
2 dispose of Methanex's entire claim. The ban of  
3 MTBE in California gasoline relates to producers of  
4 California gasoline and producers of MTBE. It does  
5 not relate to Methanex, which does not make or  
6 market either gasoline or MTBE. Because Methanex  
7 has failed to establish that the measures relate to  
8 it within the meaning of Article 1101(1), its  
9 claims must be dismissed.

10           Methanex's claims also fail on their  
11 merits. Methanex has not established that it has  
12 suffered any loss proximately caused by the  
13 measures or, indeed, that it has suffered any loss  
14 at all.

15           First, the claims are too remote. They  
16 depend upon the effects of the MTBE ban on  
17 suppliers of California gasoline, who will buy less  
18 MTBE from MTBE producers, who, in turn, will  
19 allegedly buy less methanol from methanol producers  
20 like Methanex. It is well settled under customary  
21 international law that claims premised on such

1 remote effects cannot stand.

2           In its first memorial in this case  
3 submitted in November of 2000, the United States  
4 collected numerous international case authorities.  
5 Those authorities established that claims based on  
6 the effects of state action upon the claimant's  
7 contractual counterparty are too remote to satisfy  
8 the international law principle of proximate  
9 causation. Methanex has never identified any  
10 international authority to dispute the holdings of  
11 those cases which we put forward.

12           Secondly, Methanex has also failed to  
13 prove that it suffered any loss at all as a result  
14 of the ban of MTBE. As the President and now Chief  
15 Executive Officer of Methanex advised Methanex  
16 investors earlier this year, in only one of many  
17 similar statements by Methanex officials, the MTBE  
18 ban has--and I'm quoting him, really had no impact  
19 on our industry, unquote. And he was referring to  
20 the methanol industry.

21           To the contrary, the years since

1 California's ban on MTBE have been golden ones for  
2 Methanex. Methanol prices have been high and  
3 supplies tight in all markets, including in the  
4 United States. Methanex's stock price has  
5 increased by 425 percent over the last four years.  
6 Methanex's failure to prove any loss on this record  
7 is not surprising. It is, nonetheless, fatal to  
8 every one of Methanex's claims.

9           Beyond these threshold problems posed to  
10 its case under Article 1101, Methanex's specific  
11 claims fare no better. The national treatment  
12 claim under Article 1102 fails on the undisputed  
13 facts in the record. It is not contested that  
14 there is a substantial methanol industry in the  
15 United States and that U.S. investors own methanol  
16 marketing and production units just like Methanex.

17           It is also not disputed that California's  
18 MTBE ban, to the extent it constitutes treatment of  
19 the methanol industry at all, accords Methanex's  
20 investments precisely the same treatment as that  
21 accorded to the U.S.-owned methanol industry.

1 California, therefore, accorded to Methanex  
2 treatment no less favorable than that it accorded  
3 in like circumstances to U.S. investors. Article  
4 1102 requires no more than this.

5 Nor has Methanex made any serious effort  
6 to support its claim under Article 1105(1). That  
7 Article requires treatment in accordance with  
8 international law. In its Amended Statement of  
9 Defense, the United States comprehensively showed  
10 how Methanex's claim that customary international  
11 law prohibits discrimination against foreign goods,  
12 has no support whatsoever. Methanex has made no  
13 answer to that showing. Its Article 1105(1) claim  
14 is baseless.

15 Methanex's claim of expropriation is  
16 similarly without merit. The parties' pleadings  
17 raise interesting issues with respect to the law of  
18 expropriation, but these issues are really beside  
19 the point, given the evidentiary record. Methanex  
20 has not attempted to prove that anything at all was  
21 taken away from it by California's measures. But

1 without a taking, a question of whether there has  
2 been an expropriation does not arise. Because the  
3 record here does not begin to show an  
4 expropriation, Methanex's Article 1110 claim should  
5 be dismissed.

6           Finally, I would to say just a word about  
7 costs. First, as noted, Methanex avoided dismissal  
8 of its claims based on its commitment that it would  
9 provide evidence of California's secret intent, a  
10 commitment that it has not kept. As the Tribunal  
11 stated in its procedural order of June the 2nd,  
12 2003, and I'm quoting it, the Tribunal is not  
13 disempowered from making an order for costs against  
14 Methanex if the Tribunal should decide that the  
15 Tribunal had no jurisdiction over the disputing  
16 parties' dispute.

17           We respectfully submit that given  
18 Methanex's failure to produce evidence the Tribunal  
19 deemed essential to its jurisdiction, in light of  
20 Methanex's conduct in these proceedings, and  
21 considering the stark inconsistencies between

1 Methanex's claims of loss and what it has  
2 repeatedly told to its shareholders about its  
3 prosperity, it is appropriate for the Tribunal to  
4 award full costs to the United States.

5           Each of my colleagues will address the  
6 points that I've just made in greater detail. The  
7 U.S. presentation will proceed as follows: First,  
8 Mark Clodfelter will summarize the principal facts  
9 relevant to the Tribunal's decision, and in doing  
10 so will show that the measures at issue here were  
11 based upon genuine concern about the threat that  
12 MTBE use poses to public water resources.

13           Bart Legum, David Pawlak and Andrea  
14 Menaker will address Article 1101(1)'s requirement  
15 that the measure relate to the measure complained  
16 of, relate to the investment or the investor. Bart  
17 Legum and Mark McNeill will present the United  
18 States's case on proximate causation.

19           That will conclude our presentation for  
20 today. Tomorrow morning, we will turn to the  
21 specific claims of breach made by Methanex. Mark

1 Clodfelter and Andrea Menaker will present the  
2 United States's case on national treatment.  
3 Carrielyn Guymon will examine Methanex's claim  
4 under Article 1105(1), and Andrea Menaker will then  
5 address the issue of Methanex's claiming of  
6 expropriation under Article 1110. Jennifer Toole  
7 will review Methanex's failure to prove its  
8 ownership of investments in the United States.

9 Ron Bettauer, who will be our impresario  
10 throughout and introduce these different  
11 presentations separately, will then conclude the  
12 U.S. presentation tomorrow.

13 I now invite the Tribunal to turn the  
14 floor over to Mr. Clodfelter who will provide the  
15 summary of the salient facts, and again, I  
16 appreciate the opportunity to appear before you,  
17 and I apologize that I'm not able to stay with you  
18 longer.

19 Thank you.

20 PRESIDENT VEEDER: Thank you, Mr. Taft.  
21 We apologize if by starting slightly late because



1 of our administrative meeting we've delayed you  
2 from your other duties, but in accordance with your  
3 request, we hand over the floor either to the  
4 impresario or to Mr. Clodfelter.

5 (Pause.)

6 MR. CLODFELTER: Mr. President, members of  
7 the Tribunal, yesterday you heard Methanex's  
8 version of events: Convoluted, conspiratorial, and  
9 largely speculative, a version based on overreading  
10 of thin evidence, giant leaps of inference,  
11 nonexistent and meaningless admissions, and calls  
12 for adverse inferences on such meritless grounds as  
13 our determination that none of their witness  
14 testimony merited cross-examination; a version  
15 based, in part, on documents of suspect origin, the  
16 first explanation of which we received for the  
17 first time in three years just last week, and a  
18 firsthand account of which we still await.

19 Methanex's version of events ignores the  
20 fundamental facts surrounding California's decision  
21 to ban the use of MTBE in gasoline. Therefore,

1 before we present our case-in-chief in response to  
2 Methanex's arguments, we want to provide an  
3 overview of some of those fundamental facts, which  
4 are, by and large, undisputed.

5           With the aim of restoring a measure of  
6 perspective to the California measures, one more  
7 formerly rooted in what actually happened, I'll  
8 cover three basic topics. First, I'll briefly  
9 review the history of the use of MTBE as an  
10 oxygenate additive in California gasoline. Second,  
11 I'll outline the background of the problem of MTBE  
12 contamination of California water supplies. And  
13 finally, I will describe in somewhat greater detail  
14 the measures that California took in response to  
15 that contamination problem. Of course, additional  
16 details of the factual record will be discussed  
17 during our presentations of the legal issues.

18           Let's begin with how MTBE came to be used  
19 in California gasoline. MTBE is a manmade chemical  
20 compound made from ethanol and isobutylene. MTBE  
21 is not methanol. MTBE is an ether; methanol is an

1 alcohol. MTBE is not even a version of methanol,  
2 no more than water is a version of hydrogen. The  
3 two chemicals are distinct and separate products,  
4 with distinct and separate properties and molecular  
5 structures. The method of combining them is a  
6 complex manufacturing process.

7 MTBE came into use in the United States in  
8 the 1970s. First, it was used as a source of  
9 octane in gasoline to replace lead, which was being  
10 phased out under Federal Government regulations  
11 aimed at reducing air pollution. MTBE's use as a  
12 fuel additive increased in response to amendments  
13 documented in 1990 to the U.S. Clean Air Act,  
14 amendments that required a higher oxygen content in  
15 gasoline.

16 The 1990 Clean Air Act amendments created  
17 two programs: The winter Oxyfuel program, and the  
18 year-round reformulated gasoline program, or RFG  
19 program. Both of these programs require that in  
20 certain metropolitan areas with severe ozone or  
21 carbon monoxide levels, gasoline must contain a

1 minimum of 2 percent oxygen by weight. Several  
2 areas of California are subject to this  
3 requirement, including Los Angeles, San Diego, and  
4 Sacramento.

5           The Clean Air Act amendments do not  
6 mandate which oxygenate additives must be used to  
7 achieve the new higher oxygen level, but the United  
8 States Environmental Protection Agency, the EPA,  
9 does impose requirements for fuel additives. The  
10 EPA requires fuels and fuel additives to satisfy  
11 certain specifications relating to vehicle emission  
12 standards.

13           In addition, as of 1994, fuel additives  
14 above a certain baseline level are required to  
15 undergo testing for health effects before they can  
16 be used commercially.

17           In practice, ethanol has been the  
18 principal oxygenate additive used in the winter  
19 Oxyfuel program. MTBE has been the principal  
20 oxygenate additive used in the RFG program. Now,  
21 the greater Los Angeles area is the exception. It

1 uses MTBE, or has, for both the winter Oxyfuel  
2 program and the RFG program.

3           Other oxygenate additives, including  
4 additives known as TAME, ETBE, DIPE and TBA, have  
5 been used little, if at all.

6           So, this is how MTBE came to be used in  
7 California gasoline. It can fairly be said that  
8 MTBE owes its very market existence to government  
9 measures aimed at limiting the harmful effects of  
10 gasoline use. But what was the effect of using  
11 MTBE as an additive in California gasoline? That's  
12 the second topic I want to review.

13           MTBE had two effects: First, it helped  
14 reduce air pollution, at least in the earlier years  
15 of its use. But as sometimes happens with complex  
16 public policy decisions, MTBE also had an  
17 unintended consequence; namely, that minute amounts  
18 of gasoline containing MTBE polluted large volumes  
19 of water to the point where that water was no  
20 longer drinkable.

21           Inevitably, because of its widespread use,

1 gasoline sometimes spills and leaks into the  
2 environment. Spills of conventional gasoline  
3 generally do not threaten drinking water supplies  
4 because the chemical components of gasoline  
5 biodegrade or break down before they have time to  
6 migrate into water resources.

7           Spills of gasoline containing MTBE,  
8 however, do threaten drinking water. MTBE is  
9 highly soluble in water. It travels through soil  
10 rapidly. Compared to other components of gasoline,  
11 MTBE is highly resistant to biodegradation.  
12 Therefore, MTBE can, and does, enter sources of  
13 public water even when other components of a  
14 gasoline leak or spill do not.

15           Once in drinking water, MTBE gives the  
16 water a foul taste and odor. MTBE-contaminated  
17 well water smells and tastes like turpentine,  
18 making it undrinkable. Even at relatively low  
19 concentrations, MTBE's taste and odor can be  
20 detected.

21           As can you see in my first slide, in

1 controlled studies, MTBE's taste is detectible at  
2 levels as low as two parts per billion. MTBE's  
3 odor is detectible at levels as low as 2.5 parts  
4 per billion.

5 California law prohibits state public  
6 drinking water agencies from delivering drinking  
7 water with an MTBE concentration of over five parts  
8 per billion, twice the level at which some people  
9 can taste and smell it.

10 So, as you can see on this screen, five  
11 parts per billion is the legal limit of MTBE in  
12 California water. And as was pointed out  
13 yesterday, the health limit in California is 13  
14 parts per billion.

15 Unfortunately, California has experienced  
16 some of the worst and most widespread MTBE  
17 contamination in the United States. Let me give  
18 you a few examples. The City of Santa Monica, a  
19 city with a population of over 80,000 people, lost  
20 half its drinking water supply when it had to close  
21 contaminated wells in 1996. Some of those wells

1 had concentrations as high as 610 parts per  
2 billion. Compare that to the five parts per  
3 billion legal limit. As shown on the slide, that's  
4 over 100 times the California limit.

5           In Glennville, California, contaminated  
6 residential drinking water wells had concentrations  
7 of MTBE of up to 20,000 parts per billion, 20,000  
8 parts per billion. This proportion is shown in the  
9 slide. That is 4,000 times the California legal  
10 limit. And since 1997, Glennville has had to rely  
11 on alternative sources of drinking water.

12           Another example: In a study published in  
13 July 1999, it was determined that in Santa Clara,  
14 California, underground fuel tanks that had been  
15 upgraded to comply with California's then new  
16 regulations continued to leak, resulting in MTBE  
17 contamination of groundwater. Levels found there  
18 were as high as 200,000 parts per billion, or  
19 40,000 times the legal limit.

20           Well, there are many other instances of  
21 such contamination. In the south Lake Tahoe area,



1 for example, the public utility district shut down  
2 35 of its public drinking water wells due to MTBE  
3 contamination. In Santa Rosa, California, a fuel  
4 distribution company contaminated nine residential  
5 and business wells resulting in the detection in  
6 1999 of MTBE at concentrations as high as 240 parts  
7 per billion in one of those wells.

8           In Los Gatos, California, it was  
9 determined that the Loma Prieta Elementary School  
10 had been serving trace amounts of MTBE to 400  
11 school children.

12           Being forced to shut down water supplies  
13 has not been the only problem, of course. Cleaning  
14 up contaminated wells has proven to be a very  
15 expensive undertaking in California. For example,  
16 a treatment facility for just five MTBE  
17 contaminated wells in Santa Monica has been  
18 estimated to cost up to \$520 million.

19           So, the notion that public and official  
20 concern about MTBE was nothing more than hysteria  
21 whipped up by ethanol producers is a fiction. MTBE

1 contamination was found in public water supplies  
2 throughout California. Mr. Pawlak will have more  
3 to say about the incidence of such contamination.

4 Not surprisingly, California's government  
5 took action, and the action taken to address the  
6 MTBE problem was is the third topic I want to  
7 address this morning. This topic will take a  
8 little longer in light of Methanex's presentation  
9 yesterday.

10 First, in October 1997, California enacted  
11 Senate Bill 521. There's a lot about this bill  
12 that is relevant to Methanex's allegations,  
13 beginning with the process by which it became law.  
14 Notably, it was adopted unanimously; that is to  
15 say, every member voting on it in both chambers of  
16 the California Legislature from both political  
17 parties represented in those chambers voted in  
18 favor of enacting it. Not a single legislator of  
19 the 114 voting members dissented. That kind of  
20 bipartisan unanimity on any public policy measure  
21 is extremely rare these days, in California or any

1 other state.

2           Moreover, the bill was signed into law not  
3 by Governor Gray Davis, but by his predecessor,  
4 Governor Pete Wilson, the same Governor who  
5 Mr. Dugan told us yesterday opposed ethanol. Davis  
6 was not even elected Governor until more than a  
7 year later and did not take office for another 15  
8 months.

9           Now, these facts about how Senate Bill 521  
10 became law are significant because of what that  
11 bill did. First, as can you see on the screen,  
12 Section 2 of the bill stated that its purpose was  
13 to provide what it termed a, quote, thorough and  
14 objective evaluation of the human health and  
15 environmental risks and benefits, if any, of the  
16 use of methyl tertiary-butyl ether, MTBE, unquote,  
17 compared to other mentioned additives.

18           To accomplish this purpose, Section 3(a)  
19 of the bill appropriated \$500,000 to be used by the  
20 University of California to carry out this thorough  
21 and objective evaluation.

1           Now, that is not an extraordinary sum, to  
2 be sure, but the Legislature knew what it was doing  
3 by designating a state institution like the  
4 University of California, since much of the work  
5 would be conducted on the University's time by  
6 faculty experts. So, the Legislature was able to  
7 leverage the \$500,000 into a much more valuable  
8 product.

9           Section 3(d) of the bill required that the  
10 evaluation be peer reviewed and subject to public  
11 hearings. In a key provision, Section 3(e) of the  
12 bill required whoever was Governor when the study  
13 and hearings were completed to make a  
14 determination. First, as you can see on the  
15 screen, that determination was to be based solely  
16 on the conclusions and recommendations of the study  
17 and the testimony presented at the public hearings.  
18 The Governor could not consider other sources of  
19 information, only the study and the testimony.

20           And second, the determination had to be  
21 one of two listed alternative possibilities. The

1 two alternatives specified, as can you see, one,  
2 and I quote, that on balance, there is no  
3 significant risk to human health or the environment  
4 of using MTBE in gasoline in this state, unquote.  
5 Or two, and I will quote again, that on balance,  
6 there is a significant risk to human health or the  
7 environment of using MTBE in gasoline in this  
8 state, unquote.

9           There were no other options. In essence,  
10 the bill provided the Governor with a binary  
11 choice, if you will. Either MTBE did not pose a  
12 significant risk or it did. And whoever was  
13 Governor, 10 days after the public hearings were  
14 completed, had to choose one or the other  
15 determination. It wasn't a free choice, remember,  
16 since it had to be based solely on the report and  
17 the testimony.

18           There were consequences, depending on  
19 which determination was made. As can you see on  
20 the screen, Section 3(f) of the bill required that  
21 if the Governor made the second determination, that

1 MTBE did suppose a significant risk, then, and I  
2 quote, notwithstanding any other provision of law,  
3 the Governor shall take appropriate action to  
4 protect public health and the environment, unquote.

5           Now, it's true, as Mr. Dugan stated in  
6 reply to Professor Reisman's question yesterday,  
7 that Section 3(f) did not specify exactly what  
8 action the Governor had to take. Mr. Dugan  
9 suggested that he could have gotten by by doing as  
10 little as banning two-cycle engines on surface  
11 water. But that option is not even mentioned in  
12 the bill. The only specific possible course of  
13 action mentioned in Senate Bill 521 was to ban the  
14 use of MTBE in gasoline.

15           As can you see on the screen, the very  
16 next section of the bill, Section 4, provided that,  
17 quote, If the sale and use of MTBE in gasoline is  
18 discontinued pursuant to subsection F of Section 3,  
19 unquote, the state under subparagraph A was  
20 prohibited from relaxing requirements of MTBE and  
21 was required to notify the EPA under subsection B.

1 Thus, discontinuance of MTBE use was the only  
2 action mentioned in the entire bill.

3           So, that's the first thing that the state  
4 did in response to the MTBE contamination problem.  
5 It passed Senate Bill 521. That bill essentially  
6 prewired the public policy decision on how to  
7 handle MTBE. First, an objective study and  
8 hearing, and then if the study and hearing gave  
9 MTBE a thumbs up, the Governor could certify no  
10 significant risk. But, if the study and testimony  
11 gave MTBE a thumbs down, the Governor had no real  
12 choice. He had to certify that there was a  
13 significant risk. And in that case, he also had to  
14 take action. And the only action contemplated  
15 anywhere in the bill was a ban on MTBE use.

16           And what is even more significant, this  
17 preprogrammed, almost mechanical process  
18 either--leading either to no action or to a ban on  
19 MTBE was the unanimous public policy choice of the  
20 California Legislature and that supposedly  
21 antiethanol Governor, Pete Wilson.

1           Well, the study was conducted, and in  
2 November 1998 the University of California issued  
3 the report required by Senate Bill 521. The UC  
4 report comprised 17 independently prepared papers,  
5 filling five volumes and spanning more than 600  
6 pages. More than 60 highly credentialed  
7 researchers authored the report.

8           PRESIDENT VEEDER: Just before we move on  
9 with the report, can I take you back to the passage  
10 you read in Section D, that's Section 2(d) of the  
11 Senate Bill. And if you have it before you, but I  
12 can read out the relevant words. It was the  
13 deadline of the 1st of January 1999, the university  
14 shall submit a draft report, and then upon  
15 receiving the draft report, the Governor shall take  
16 all of the following actions. Under (d)(1) he  
17 transmits the draft report, without any alteration,  
18 to two institutions for comments, and then he  
19 issues a notice of intent to hold two public  
20 hearings.

21           And if you look at the end of that



1 paragraph two, the draft report apparently becomes  
2 a report, and then in E the Governor has to act  
3 solely upon the assessment and report submitted  
4 pursuant to the previous provisions.

5           There's nothing in this particular bill to  
6 explain how the draft report becomes a report; is  
7 that right? Or am I missing something?

8           MR. CLODFELTER: I believe that you're  
9 correct, that the bill is silent on that, but I  
10 believe that this process is known, and I do not  
11 believe that the report was changed after the  
12 assessment.

13           PRESIDENT VEEDER: We could come back to  
14 it later. I don't want to interrupt you.

15           MR. CLODFELTER: I will just note one  
16 thing. It's actually in Section 3(d) as opposed to  
17 Section 2(d).

18           Ms. Menaker will give an answer to your  
19 question.

20           MS. MENAKER: Thank you. After the draft  
21 report was issued, then it could be revised based

1 on the peer review comments received, and also  
2 based on comments received during the public  
3 testimony.

4 MR. CLODFELTER: To continue,  
5 Mr. President, the conclusions of the 60 highly  
6 credentialed researchers in the UC report were  
7 firm. First, MTBE's pollution-reducing benefits  
8 had pretty much run their course. Reports stated,  
9 as you can see on the screen, MTBE and other  
10 oxygenates were found to have no significant effect  
11 on exhaust emissions from advanced technology  
12 vehicles. So, as the technology of automobile  
13 engines advanced, the additives had less and less  
14 pollution-reducing benefits.

15 The report concluded that the use of MTBE  
16 in gasoline poses significant risks and costs due  
17 to water contamination, and found that continued  
18 use of MTBE would increase the danger of water  
19 contamination. It's worth considering this finding  
20 in full, and so with your indulgence, I'm going to  
21 take the time to read that entire significant

1 finding, which you can see on the screen as well.

2           There are significant risks and costs  
3 associated with water contamination due to the use  
4 of MTBE. MTBE is highly soluble in water and will  
5 transfer readily to groundwater from gasoline  
6 leaking from underground storage tanks, pipelines,  
7 and other components of the gasoline distribution  
8 system. In addition, the use of gasoline  
9 containing MTBE in motor boats, in particular those  
10 using older two-stroke engines, results in the  
11 contamination of surface water reservoirs. The  
12 extent of MTBE contamination is discussed in more  
13 detail in Section 5, but it is clear that we are  
14 placing our limited water resources at risk by  
15 using MTBE.

16           MTBE has been detected in several water  
17 supply systems, which have shut down the  
18 contaminated sources, resorting to alternative  
19 supplies or treatment. Since both groundwater  
20 wells and surface water reservoirs have been  
21 contaminated, alternative water supplies may not be

1 an option for many water utilities. If MTBE  
2 continues to be used at current levels and more  
3 sources become contaminated, the potential for  
4 regional degradation of water resources, especially  
5 groundwater basins, will increase. Severity of  
6 water shortages during drought years will be  
7 exacerbated.

8           The report also found that the cost of  
9 treating MTBE-contaminated water resources would be  
10 enormous. And again, I would like to read the  
11 entire finding, which you can see on the screen.

12           The cost of treatment of MTBE-contaminated  
13 drinking water sources in California could be  
14 enormous. In addition, the cost of remediating  
15 underground storage tank and pipeline leaks and  
16 spills could be on the order of tens to hundreds of  
17 millions of dollars per year. There are other  
18 significant costs to the economy, which may be in  
19 the tens of millions of dollars per year, in terms  
20 of monitoring of surface water resources for MTBE  
21 and potential losses in recreational income to

1 surface water reservoirs that ban or restrict the  
2 use of gasoline-powered boats. We believe that the  
3 use of either nonoxygenated reformulated gasoline,  
4 or ethanol as an oxygenate in CaRFG2 would result  
5 in much lower risk to water supplies, lower water  
6 treatment costs in the event of a spill of either  
7 of these alternative RFG formulations, and lower  
8 monitoring costs.

9           These were the report's principal  
10 findings. The recommendations of the report were  
11 equally as straightforward. To remedy the problem,  
12 the report recommended the phasing out of the use  
13 of MTBE in gasoline over the course of several  
14 years. As you can see on the screen, the report  
15 recommended rather than an immediate ban on MTBE,  
16 we recommend consideration of phasing out MTBE over  
17 an interval of several years.

18           In other words, the, quote, thorough and  
19 objective evaluation, end quote, required by Senate  
20 Bill 521, on the basis of which the Governor was  
21 required to act, stated unequivocally that the

1 answer to the real and threatened problem of MTBE  
2 use was to end its use as an oxygenate additive in  
3 California gasoline.

4           The report had something to say as well  
5 about switching to ethanol in lieu of MTBE. As  
6 Mr. Dugan pointed out yesterday, the report's ninth  
7 recommendation, which we have put up on the screen,  
8 urged caution and further study before substituting  
9 ethanol for MTBE in California gasoline. It did  
10 not recommend the substitution of ethanol for MTBE.  
11 It did not call for the establishment of a  
12 California ethanol industry.

13           In fact, the report's second  
14 recommendation called for the state to obtain a  
15 waiver of the Federal requirement that RFG gasoline  
16 sold in California have an oxygen content, a waiver  
17 that would allow the use of RFG gasoline without  
18 ethanol or any other oxygenate additive.

19           Public hearings were held on the draft UC  
20 report in 1999. At those hearings, the report's  
21 authors made presentations and government officials

1 and public citizens had an opportunity to ask  
2 questions. Members of public also testified at the  
3 hearing, several of them relating their firsthand  
4 experiences with the negative effects of MTBE  
5 contamination. In all, a majority of those  
6 testifying supported the report's conclusions and  
7 recommendations.

8           It should also be noted that the report  
9 was peer-reviewed, as required by the U.S.  
10 Geological Survey and the Centers for Disease  
11 Control. Both agencies reviewed the report  
12 favorably.

13           Now, what happened next could not have  
14 been a surprise. You didn't have to be a weather  
15 man to know which way the wind was blowing, and  
16 Senator Burton did not have to be a seer to have  
17 foreseen the upcoming action to ban MTBE use. It  
18 was essentially preordained. Senate Bill 521,  
19 signed by ethanol opponent Pete Wilson, directed  
20 the Governor to follow the lead of the report and  
21 the hearings. And the ethanol averse report itself

1 required a determination of significant risk. And  
2 the bill and the report together left no serious  
3 alternative to banning MTBE use.

4           So, in the face of the UC report and the  
5 hearings, Governor Gray Davis took action as Senate  
6 Bill 521 required. A few weeks after the hearings,  
7 Governor Davis issued the 1999 Executive Order.  
8 First, the Executive Order made the determination,  
9 as it had no choice but to do based on the UC  
10 report and public testimony, that there was on  
11 balance a significant risk to the environment from  
12 using MTBE in California gasoline.

13           Second, it directed the responsible  
14 California agencies to develop a timetable for the  
15 removal of MTBE from gasoline. The Executive Order  
16 directed that MTBE be discontinued as soon as it  
17 was feasible, but no later than the end of 2002.

18           Third, as the UC report recommended should  
19 be done, the Executive Order required state  
20 agencies to seek a waiver from the EPA of the  
21 Federal RFG oxygenate requirement so that



1 California could use gasoline that met air quality  
2 standards without using any oxygenate, including  
3 ethanol.

4 Finally, the order directed state agencies  
5 to prepare reports on the effects of using ethanol  
6 as an oxygenate additive in gasoline.

7 Subsequently, as shown on the screen, as  
8 you know, the state did seek a waiver from the EPA,  
9 as the UC report recommended and as Governor Davis  
10 directed. The Legislature also took further action  
11 after the UC report was issued.

12 In October 1999 the Legislature passed,  
13 and Governor Gray Davis signed into law, Senate  
14 Bill 989. That bill imposed new requirements to  
15 prevent leaks from underground storage tanks that  
16 were more stringent in many respects than Federal  
17 regulations. And it also required the responsible  
18 state agencies to develop a timetable for the  
19 removal of MTBE from gasoline at, quote, the  
20 earliest possible date, unquote.

21 In response to this legislation, in June

1 2000, the California Air Resources Board  
2 promulgated the reformulated gasoline Phase III  
3 regulations, prohibiting the use of MTBE in  
4 gasoline after December 31st, 2002.

5           The regulations also required reductions  
6 in sulfur and benzene levels in California  
7 gasoline. And in 2001, EPA denied California's  
8 request for the oxygenate waiver.

9           In response, Governor Davis brought an  
10 action in U.S. Federal court to challenge that  
11 denial. In March of 2002, he also issued another  
12 Executive Order, this one postponing the MTBE ban  
13 for one additional year. The order noted that  
14 insufficient ethanol supplies would lead to a  
15 gasoline shortage if the ban went forward as  
16 scheduled at the end of 2002. The California  
17 reformulated gasoline Phase III regulations were  
18 amended accordingly to postpone the ban until the  
19 end of 2003.

20           And then again, as can you see on the  
21 screen, last year the Ninth Circuit Court of

1 Appeals overturned EPA's denial of California's  
2 waiver request, ruling that it was an abuse of  
3 discretion not to grant the waiver. And California  
4 has since renewed that request, which is now  
5 pending.

6           Finally, the ban on MTBE use in California  
7 gasoline took effect at the beginning of this year.

8           These, in short, are the undisputed facts,  
9 and the story they tell about the ban on MTBE use  
10 is impossible to reconcile with the story Methanex  
11 would have you believe. Methanex's theory of a  
12 conspiracy to harm foreign methanol producers is  
13 contradicted at every turn by these facts, by the  
14 real and widespread and persistent contamination of  
15 California water resources by MTBE, by the fact  
16 that the California Legislature passed Senate Bill  
17 521 unanimously, and by the fact that that bill  
18 left whoever was serving as Governor with little  
19 choice but to do exactly what the 1999 Executive  
20 Order did, in fact, do.

21           Methanex's theory of a conspiracy to

1 advance the cause of ethanol is also contradicted  
2 by these facts, by the fact it was Governor Davis's  
3 antiethanol predecessor signed that bill into law,  
4 by the fact that in recommending an MTBE ban, the  
5 UC report also cautioned against a switch to ethanol,  
6 by California's request for a waiver of the EPA's  
7 oxygenate requirement for RFG gasoline, and by  
8 California's continued pursuit of that waiver in  
9 court, and even now after the MTBE ban has gone  
10 into effect.

11           The real story of the MTBE ban is really  
12 quite simple. Just seven years after MTBE came  
13 into widespread use, California found itself  
14 suffering serious problems with public water  
15 contamination. It commissioned a major study of  
16 those problems and was told by objective and highly  
17 respected experts that the way to solve them was to  
18 end the use of MTBE in gasoline. California did  
19 this. Even as it sought to be relieved of the  
20 Federal requirement to use any oxygenate additive  
21 at all, including ethanol, in RFG gasoline.

1           We will have a lot more to say about the  
2 proven facts in the case as we present our  
3 case-in-chief in greater detail, but unless you  
4 have questions now, I propose to turn the chair  
5 over to Mr. Bettauer, who will introduce our  
6 presentation on the legal issues in the case.

7           PRESIDENT VEEDER: We just have one  
8 question, and I wonder if you could help us about  
9 the Executive Order D-5-99 of the 25th of March,  
10 1999.

11           And if you look at the third preamble  
12 which refers to the findings and recommendations of  
13 the UC report and public testimony, it continues,  
14 and regulatory agencies, while MTBE has provided  
15 California with clean air benefits because of  
16 leaking underground fuel storage tanks, MTBE poses  
17 an environmental threat to groundwater and drinking  
18 water.

19           Now, at a later stage, could you just help  
20 us identify what are the findings and  
21 recommendations of the regulatory agencies there

1 described.

2           And the other question, you heard  
3 yesterday Mr. Dugan make a point that this was an  
4 Executive Order based upon an environmental threat.  
5 And indeed, if you look at the fourth paragraph,  
6 the certification or the finding by the Governor,  
7 and this is the passage in quotes, is a reference  
8 to the significant risk to the environment from  
9 using MTBE in gasoline in California, and not to  
10 the other phrase we saw in the Senate Bill health.

11           First of all, as regards to the latter, do  
12 you accept that there is this distinction?

13           MR. CLODFELTER: Mr. President, we doubt  
14 that there is a mutually exclusive distinction, and  
15 environmental concerns subsume many public health  
16 concerns, so we would not read too much into the  
17 certification for environmental purposes and all as  
18 excluding concern for the health effects.

19           With respect to your first question, I  
20 believe the reference to regulatory agencies is the  
21 reference to the peer review agencies which were

1 required to review the draft report and make  
2 comments. But I also know that state agencies  
3 appeared at the public hearings and offered  
4 testimony, so that could be merely redundant of the  
5 reference to public testimony.

6           The content of those recommendations we  
7 will summarize and get to you in response to your  
8 question later, if that's okay.

9           PRESIDENT VEEDER: Thank you. It's been  
10 suggested by my colleagues this would be a good  
11 time to break for coffee, but you are the masters  
12 of the situation. Will this be a good time or a  
13 bad?

14           MR. CLODFELTER: It's a good time.

15           (Brief recess.)

16           PRESIDENT VEEDER: Let's resume.

17           MR. BETTAUER: Thank you. Mr. President,  
18 members of the Tribunal, you've now heard  
19 Mr. Taft's introduction and Mr. Clodfelter's  
20 summary of the facts. Since the United States will  
21 have a number of presenters on each of the major

1 topics, I will intervene from time to time to draw  
2 this together and to give you a brief overview of  
3 how the parts of our presentation fit together.  
4 Tomorrow, I will do the same at the beginning of  
5 our presentation, and then we'll conclude the U.S.  
6 first round presentation.

7           We now turn to our presentation on  
8 jurisdiction. Our presentation will first address  
9 the issue under Article 1101(1) left open by the  
10 First Partial Award, whether Methanex has met the  
11 requirement of that award to show that the ban of  
12 the sale of California gasoline containing MTBE  
13 relates to methanol producers like Methanex.

14           We will divide our treatment of this issue  
15 into three parts. First, Mr. Legum will take the  
16 floor. He will show that there is no evidence to  
17 suggest that California intended to harm methanol  
18 producers by banning MTBE. He will also  
19 demonstrate that methanol does not compete with  
20 ethanol in any sense relevant here.

21           Second, Mr. Pawlak will address the



1 scientific evidence in this case. He will show  
2 that contrary to Methanex's arguments, the  
3 scientific evidence supports California's action.  
4 The record cannot sustain Methanex's contention  
5 that science was a pretext for harming methanol  
6 producers.

7           At this point, it will likely be time for  
8 the lunch break.

9           The third point, the third part of our  
10 presentation on this issue will be given by  
11 Ms. Menaker. She will show that contrary to  
12 Methanex's contention, the record does not support  
13 Methanex's suggestion that the ban was intended to  
14 provide a gift to the ethanol industry. Instead,  
15 California's intent was precisely what it said it  
16 was, to protect the state's groundwater resources  
17 from a contaminant that made water undrinkable.

18           At the end of those three parts, I will  
19 return to provide a brief conclusion to this part  
20 of the presentation.

21           Mr. President, I now request that you call

1 on Mr. Legum.

2 PRESIDENT VEEDER: Thank you very much,  
3 and we do, indeed, call upon Mr. Legum.

4 MR. LEGUM: Mr. President, members of the  
5 Tribunal, I will now begin the United States's  
6 presentation on the jurisdictional issue left  
7 unresolved by the First Partial Award in this case,  
8 whether the ban of MTBE relates to Methanex and its  
9 investments, as required by NAFTA Article 1101(1).  
10 My remarks this morning will be divided into three  
11 parts. First, I will briefly review the holdings  
12 of the First Partial Award and the limited  
13 jurisdictional issue that the Award left for  
14 resolution in this phase of the proceedings. I  
15 will demonstrate that under the First Partial  
16 Award, only a showing that the ban of MTBE was  
17 intended to harm or at least address methanol  
18 producers like Methanex could establish the legally  
19 significant connection between measure and  
20 investment that the Tribunal found to be lacking.  
21 Second, I will examine the evidence of

1 record presented by the disputing parties on this  
2 subject. I will demonstrate that the evidence in  
3 no way suggests, much less establishes, that  
4 California intended to get at methanol producers by  
5 banning MTBE.

6           Finally, I will address the latest version  
7 of Methanex's argument that methanol competes with  
8 ethanol in the market for oxygenate additives in  
9 California. I will show that the Tribunal already  
10 rejected that argument in its First Partial Award  
11 and that in any event, Methanex has failed to prove  
12 any such competition.

13           I turn now to my first topic, a review of  
14 the jurisdictional issue that the First Partial  
15 Award left unresolved. Article 1101(1) of the  
16 NAFTA, and this is my first slide, although I  
17 suspect that everyone in this room has memorized it  
18 by now, that Article delineates the scope of the  
19 investment Chapter as follows: Quote, This Chapter  
20 applies to measures adopted or maintained by a  
21 party relating to investors of another party and

1 investments of investors of another party in the  
2 territory of the party.

3           The First Partial Award found that the  
4 measures at issue on their face did not relate to  
5 Methanex or to its investments. The measures  
6 banned the sale of California gasoline containing  
7 MTBE. Methanex does not produce or market  
8 California gasoline. It does not even produce or  
9 market MTBE. Instead, it makes methanol.

10           While, as the First Partial Award noted,  
11 methanol is a feedstock for the production of MTBE,  
12 this fact was not sufficient to establish that the  
13 ban of MTBE related to methanol producers as  
14 required by Article 1101(1). But, as the Tribunal  
15 noted, Methanex also alleged that even though on  
16 its face the measures related only to MTBE,  
17 California, according to Methanex, secretly  
18 intended to harm methanol producers and marketers  
19 by banning MTBE. The Tribunal held that if  
20 Methanex could establish that the ban of MTBE was  
21 really intended to address methanol producers, even

1    though this was not apparent on the face of the  
2    measures for the facts alleged, then Methanex could  
3    establish that the ban related to it and its  
4    investments.

5           I'll turn to my next slide. Only this  
6    specific showing could establish jurisdiction in  
7    this case, as the Tribunal unambiguously held in  
8    the operative part in the First Partial Award.  
9    Only, quote, certain allegations relating to the  
10   intent underlying the U.S. measures could  
11   potentially meet the requirements of Article  
12   1101(1).

13           And as the Tribunal explained in its  
14   September 25, 2002, letter to the disputing  
15   parties, which is my next slide, the Tribunal, and  
16   I quote, has already decided that its jurisdiction  
17   can exist only in respect of that part of the claim  
18   alleging an intent underlying the U.S. measures to  
19   benefit the U.S. ethanol industry and to penalize  
20   foreign methanol producers such as Methanex, closed  
21   quote.

1 I wish to highlight--

2 PRESIDENT VEEDER: Just before you move  
3 on, what paragraph of that is in our letter?

4 MR. LEGUM: It appears at the bottom of  
5 the slide that you have. It looks like paragraph  
6 seven, from here.

7 PRESIDENT VEEDER: Proceed.

8 MR. LEGUM: I wish to highlight that in  
9 rendering this ruling, the First Partial Award made  
10 clear that the showing required was one concerning  
11 intent to address methanol producers. The Award  
12 made clear in its discussion at paragraphs 153 to  
13 157 that a showing of intent to address or harm  
14 MTBE producers and benefit ethanol producers would  
15 not be sufficient. The proof required under the  
16 Award, therefore, is proof that the intent  
17 underlying the ban of MTBE was to address methanol  
18 producers.

19 Mr. President, members of the Tribunal,  
20 Methanex has not remotely come close to the  
21 required showing. Reviewing the evidentiary

1 materials offered by Methanex on the measure's  
2 supposed intent to harm methanol producers does not  
3 take long, for there is little of it. Methanex  
4 offers five pieces of evidence that, according to  
5 it, show a link between the measures and Methanex  
6 or methanol producers as opposed to MTBE or  
7 ethanol. This is, under the First Partial Award,  
8 the evidence on which Methanex's case hinges.

9           To review the materials highlighted by  
10 Methanex as supporting this point is to confirm  
11 that there is no substance to this allegation, and  
12 it is to that task that I now turn.

13           The first material that Methanex offers to  
14 show a specific intent to address methanol  
15 producers is the testimony of Robert Wright.  
16 Mr. Wright is a governmental affairs officer for  
17 Methanex. In his November 2002 statement, he  
18 recounts a conversation that he says took place in  
19 January 1999. In that conversation, almost four  
20 years before the date of Mr. Wright's statement,  
21 unidentified persons recounted to him a

1 conversation they allegedly had with Senator John  
2 Burton of the California Senate.

3           In that conversation, Mr. Wright says they  
4 said Senator Burton said that he recommended  
5 shorting Methanex's stock. The Senator also  
6 supposedly gave his views on how likely it was that  
7 the Governor would not find MTBE to be a risk to  
8 drinking water, but that statement on MTBE could  
9 not show an intent to address methanol producers in  
10 any event.

11           Mr. Wright's testimony is entitled to no  
12 weight for several reasons. First, it is hearsay  
13 upon hearsay. International tribunals have  
14 repeatedly declined to rely upon such statements,  
15 as the United States demonstrated in paragraph 127  
16 of the Amended Statement of Defense.

17           Second, although Methanex in its reply at  
18 paragraph 37 attempted to shore up Mr. Wright's  
19 testimony by offering two unauthenticated memoranda  
20 written by unidentified persons to unidentified  
21 persons a few days after the supposed conversation,



1 neither memo contains any reference to Senator  
2 Burton's supposed remark about shorting Methanex  
3 stock.

4 Far from confirming the reliability of  
5 Mr. Wright's recollection of this conversation  
6 about a conversation four years before, the  
7 memoranda raised more questions about it.

8 Now, yesterday during the course of  
9 Methanex's presentation, the President asked the  
10 question about the word "your" in the two-word  
11 phrase allegedly uttered by the Senator. The  
12 President asked whether the use of that word in  
13 that phrase could suggest a focus on Methanex or  
14 methanol, and Mr. Dugan essentially replied yes.  
15 Well, that does not appear to be the way that the  
16 people who were there perceived that supposed  
17 remark, at least according to the memoranda from  
18 unidentified persons that Methanex has supplied.

19 This is my next slide from the first  
20 memoranda, the one that Methanex referenced  
21 yesterday in its presentation. That person in that

1 memorandum said, quote, Burton was perhaps the most  
2 candid legislator to date, suggesting in only two  
3 words that a phaseout was inevitable, closed quote.  
4 This statement suggests that the Senator provided a  
5 view on the likelihood of a ban, not on its impact  
6 on MTBE producers, much less on methanol producers.

7           My next slide is the conclusion of the  
8 second memorandum that Methanex supplied. Quote, I  
9 think John Burton's comments accurately reflected  
10 the general belief in the Legislature that MTBE  
11 will be phased out within a fairly quick time  
12 frame, closed quote.

13           Again, nothing in this statement suggests  
14 that the impact of the ban on producers of MTBE or  
15 methanol was the thrust of the Senator's remarks.  
16 The supposed contemporaneous notes do not  
17 corroborate Mr. Wright's statement.

18           My third point about Mr. Wright's  
19 statement is that it supplies no context or  
20 foundation for Senators' supposed statement about  
21 shorting stock. Notably, it does not suggest that

1 the Senator understood what Methanex was, or,  
2 notably, that it produced methanol rather than  
3 MTBE.

4           Fourth, even taken at face value, Senator  
5 Burton's supposed remark about shorting does not  
6 show an intent to address methanol producers. At  
7 best, the statement would suggest an understanding  
8 that a ban of MTBE might have an impact on methanol  
9 producers like Methanex. As the First Partial  
10 Award makes clear, however, there is a world of  
11 difference between a measure that affects a person  
12 and a measure intended to harm or address a person.

13           Finally, and in any event, Senator Burton  
14 was but a single government actor in a very large  
15 government. He was one of 35 members of the  
16 California Senate. As the Tribunal observed in its  
17 First Partial Award, and this is my next slide,  
18 it--I'm just querying whether Senator Burton was an  
19 actor at all. If you go to page 28 of Mr.  
20 Clodfelter's charts, where he has the time line  
21 running from SB521 in 1997, to the date when the

1 ban went into effect, I think Senator Burton was in  
2 the Senate and presumably voted on SB521 with his  
3 colleagues. But after that did he take any further  
4 part in the events that followed, as a legislator?

5 MR. LEGUM: The next legislative action  
6 was Senate Bill 989, which was enacted, my  
7 recollection is, in November of 1989, but I could  
8 be off by a few months.

9 PRESIDENT VEEDER: I see. So, he would  
10 have taken part in--

11 MR. LEGUM: Did I say '89? '99.

12 PRESIDENT VEEDER: '99, November 1999,  
13 Senate Bill 989.

14 MR. LEGUM: Yes, and I must say that we  
15 have not gone back to looked at the records to see  
16 whether he voted for or against that bill. There  
17 were a few dissenting votes for that bill.

18 PRESIDENT VEEDER: We can take it he was a  
19 still a member of the California Senate in November  
20 1989?

21 MR. LEGUM: That is my understanding.

1           PRESIDENT VEEDER: I'm sorry, I'll get it  
2 right one day. 1999. Thank you.

3           MR. LEGUM: Stuck in the eighties.

4           As the Tribunal observed in the First  
5 Partial Award, it does not necessarily follow that  
6 the views of a single governmental actor can be  
7 attributed to the entire government. The evidence  
8 must, as the Tribunal noted, prove such a thing.  
9 Even if Senator Burton did think it wise to short  
10 Methanex stock in early 1999, nothing suggests that  
11 he influenced any relevant government body or  
12 officer to act in accordance with that view.

13           In sum, Mr. Wright's statement does  
14 nothing to advance Methanex's case.

15           The second piece of evidence that Methanex  
16 relies upon is a single sentence published by the  
17 U.S. Federal Environmental Protection Agency on  
18 page 68,350 of the 1993 volume of the Federal  
19 Register. The text in question is my next slide.

20           The publication proposed a rule that would  
21 have required that 30 percent of reformulated

1 gasoline contain oxygenate additives produced from  
2 renewable resources--renewable sources. U.S. EPA  
3 predicted in 1993 that this proposed regulation  
4 would have an impact on methanol producers, and  
5 there is the statement that Methanex relies on.  
6 Revenues and net incomes of domestic methanol  
7 producers and overseas producers of both methanol  
8 and MTBE would likely decrease due to reduced  
9 demand in prices.

10           This piece of evidence does nothing to  
11 show California's intent in banning MTBE over half  
12 a decade later. First, nothing suggests that  
13 California officials were even aware of this  
14 sentence in this Federal notice from years before  
15 the decision to ban MTBE. This Federal statement  
16 says nothing about California's intent.

17           Now, in its motion on evidentiary matters,  
18 Methanex argues that this is a conclusive admission  
19 irrevocably binding on the United States. It is  
20 nothing of the kind, and the authorities Methanex  
21 cites to support the proposition do not support it.

1           Under U.S. law, which Methanex references  
2 in its motion, a statement of a party opponent is  
3 admissible evidence under an exception to the  
4 hearsay rule. All this means is that it may be  
5 considered by the trier of fact. It does not mean  
6 that the statement has any special significance  
7 beyond its ordinary context.

8           The two international authorities  
9 referenced by Methanex address very different kinds  
10 of statements, statements made in the realm of  
11 foreign relations by the President or the Foreign  
12 Minister of a country. That is not what we are  
13 talking about here.

14           Putting it a slightly different way, the  
15 United States, as a state in international law, may  
16 be responsible for the acts of its subnational  
17 government units, but that does not make the intent  
18 or knowledge of one governmental unit attributable  
19 to another unit. The issue here is California's  
20 intent. This U.S. EPA statement sheds no light on  
21 California's intent.

1           Second, as with the supposed Burton  
2 statement, all this statement does is show an  
3 understanding that the proposed regulation might  
4 have an impact on methanol producers. It does not  
5 even suggest that the Federal Government's purpose  
6 was to address methanol producers, much less that  
7 the California government had such a purpose.  
8 Indeed, Methanex's reliance on this sentence  
9 highlights a fundamental defect in Methanex's  
10 approach. It's equating foreseeability with  
11 intent. It may well be foreseeable, for example,  
12 if I have a large dinner party at a restaurant  
13 owned by a friend, that that will have a beneficial  
14 impact on my friend's restaurant and a detrimental  
15 impact on other restaurants of its class in the  
16 city. That does not mean, however, that I intend  
17 to act to the detriment of other restaurants in the  
18 city by having dinner at my friend's restaurant.  
19 Foreseeability may be necessary to a finding of  
20 intent, but it is certainly not sufficient.  
21           Moreover, as both of the submissions



1 amicus curiae here have pointed out, it is good  
2 public policy for governments issuing regulations  
3 to try to assess all possible consequences before  
4 adopting a measure. Equating foreseeability and  
5 intent, as Methanex suggests, could chill this  
6 useful practice. Methanex's approach fails on  
7 policy grounds as well.

8           The fourth--the third and fourth pieces of  
9 evidence Methanex offers is a transcript of a 1992  
10 interview that Dwayne Andreas gave on television  
11 and a copy of a 1998 letter by Doug Vind. I note  
12 that the Doug Vind letter is one of the pieces of  
13 evidence admitted by the Tribunal de bene esse  
14 subject to further order by this Tribunal.

15           Each of these materials briefly refers to  
16 foreign methanol production, albeit in different  
17 contexts. Dwayne Andreas was the Chairman of  
18 Archer Daniels Midland, ADM, and is a relative of  
19 Alan Andreas and Marty Andreas. Those two people  
20 were present at the August 1998 dinner with  
21 gubernatorial candidate Davis. Doug Vind is the

1 son of Richard Vind, who was also present at that  
2 dinner.

3           Here is what Methanex's argument is.  
4 Methanex argues based on these two statements,  
5 that, quote, it is overwhelmingly likely, closed  
6 quote, that at the August 1998 dinner with Gray  
7 Davis, Dwayne Andreas and Richard Vind talked about  
8 methanol and inevitably described it as a foreign  
9 product. This argument is ill conceived for  
10 several reasons.

11           First of all, neither of the speakers  
12 whose prior statements Methanex references were  
13 even present at the dinner. Dwayne Andreas was not  
14 there. Doug Vind wasn't there, either.

15           Methanex is asking the Tribunal to  
16 speculate that because these relatives of the  
17 people who were there at the dinner had made  
18 certain statements on two isolated occasions before  
19 those people who were at the dinner must have said  
20 something similar. This case, however, must be  
21 decided on the basis of the evidence, not on

1 speculation.

2           The evidence that is of record, three  
3 witness statements by people who were there,  
4 unanimously confirmed that there was no discussion  
5 of Methanex or methanol at that dinner.

6           Now, yesterday Methanex also showed slides  
7 of statements concerning imported methanol by  
8 various persons or organizations who also were not  
9 at the August 1998 dinner. Citizen Action, which  
10 was Tab 53 of the presentation yesterday, they  
11 weren't at the dinner. Representative Jim Nussle  
12 of Iowa--that's Tab 50--he wasn't there. Senator  
13 Tom Daschle of South Dakota, Tab 51, he wasn't at  
14 that dinner either. The record shows no connection  
15 between any of these people and the California  
16 measures at all. These additional statements add  
17 nothing.

18           My second point is that in any event,  
19 Methanex's whole premise concerning the August 1998  
20 dinner is misconceived. Methanex's premise seems  
21 to be that if constituents or supporters tell an

1 elected official their views on a subject, the  
2 official necessarily becomes hypnotized and is  
3 compelled to act in accordance with the views  
4 expressed. This premise is supported neither by  
5 the record nor by common sense. Elected officials  
6 are constantly exposed to a wide range of views on  
7 a variety of subjects. The mere fact that an  
8 official hears any particular point of view says  
9 nothing about whether the official will act in  
10 reliance on those views.

11           Plus, the record does not support  
12 Methanex's allegations that methanol was discussed  
13 at the dinner, but in any event, the record does  
14 not support the underlying notion that a candidate  
15 like Mr. Davis is necessarily brainwashed by views  
16 expressed by a supporter or constituent. I would  
17 note that Andrea Menaker will have more to say on  
18 the subject of the 1998 dinner when she addresses  
19 Methanex's allegations of an intent to benefit  
20 ethanol.

21           I'd now like to turn to the final piece of

1 evidence that Methanex relies upon, to support its  
2 claim that California decision makers had methanol  
3 in mind in banning MTBE. This is the conditional  
4 prohibition of about a dozen listed compounds  
5 subject to thorough testing for their impact on the  
6 environment. One of the compounds listed was  
7 methanol. Methanex argues that this separate  
8 conditional prohibition shows that the absolute ban  
9 of MTBE was intended to address methanol. The  
10 record does not support this argument.

11           The Tribunal will recall that California's  
12 actions here had essentially four components.  
13 First, California thoroughly tested MTBE and found  
14 it to pose a serious threat to the state's drinking  
15 water resources. It, therefore, banned MTBE. That  
16 ban is the measure alleged here to breach the  
17 NAFTA.

18           Second, in order to ensure that it did not  
19 repeat the mistake made by using MTBE without  
20 sufficient testing in advance, California mandated  
21 that no other oxygenate could be added to its

1 gasoline without the same thorough testing and  
2 evaluation that MTBE had undergone.

3           Third, California thoroughly tested  
4 ethanol and found that ethanol did not pose the  
5 threat that MTBE did. It, therefore, did not ban  
6 ethanol.

7           And finally, California sought a waiver of  
8 the Federal oxygenate requirement so that  
9 clean-burning gasoline not containing either MTBE  
10 or ethanol could be used. It is California's  
11 second action, the conditional prohibition of other  
12 oxygenates, that Methanex points to as evidence  
13 that California banned MTBE in order to get at  
14 methanol producers.

15           I will make two points concerning this  
16 prohibition. First, contrary to what Methanex  
17 asserted for the first time yesterday, this  
18 prohibition does not establish the legally  
19 significant connection between measure and  
20 investment that is otherwise lacking here. Second,  
21 the prohibition does not show that California

1 intended to harm methanol producers by banning  
2 MTBE.

3           My first point, the conditional  
4 prohibition is not the measure that is at issue in  
5 this case. The prohibition did not exist when  
6 Methanex submitted its claim to arbitration. It  
7 did exist in general form; that is, without the  
8 definition that specifically listed 11 compounds.  
9 It did exist in general form at the time when  
10 Methanex submitted its amended statement of claim,  
11 but Methanex made no reference to it.

12           The amendment, that's the one that  
13 provided the definition that specifically listed  
14 the 11 compounds, that was not in force when  
15 Methanex submitted its second amended statement of  
16 claim. Methanex has asserted no claim in this case  
17 based on the conditional prohibition, and in its  
18 reply Methanex made clear that the only measure at  
19 issue for purposes of Article 1101(1) is the ban of  
20 MTBE, and I would refer the Tribunal to the  
21 discussion on this subject in paragraphs 199 to 202

1 of our rejoinder.

2           If Methanex had asserted a claim based on  
3 the conditional prohibition, that claim would be  
4 barred for the reasons set forth in our Amended  
5 Statement of Defense at part six, which deals with  
6 the new jurisdictional objection, which the  
7 Tribunal will recall we withdrew in the rejoinder  
8 on the understanding that Methanex was no longer  
9 asserting that it had a claim to assert based on  
10 the conditional prohibition.

11           In sum, the question of whether the  
12 conditional prohibition relates to Methanex is not  
13 before the Tribunal since there is no claim  
14 asserted based on that prohibition. The only  
15 question presented is whether the conditional  
16 prohibition of these 11 compounds suggests that  
17 California's purpose in banning MTBE was other than  
18 what it said it was, and this is my second point:  
19 The record supports no such suggestion.

20           The record clearly establishes that the  
21 purposes of the MTBE ban and the conditional



1 prohibition were distinct. California banned MTBE  
2 because scientific research showed that it was a  
3 serious threat to drinking water resources. It  
4 conditionally prohibited the use of these other  
5 compounds because it did not know whether they  
6 posed a risk to public health or the environment,  
7 and did not wish to take the chance of using them  
8 without testing them first. The purpose of a  
9 conditional prohibition in no way suggests that  
10 California banned MTBE to get at methanol  
11 producers.

12           Second, the record is clear, and indeed  
13 uncontradicted, as to California's reasons making  
14 those 11 compounds subject to the conditional  
15 prohibition.

16           This is my next slide. The reason was  
17 simple. Those are the compounds listed in the  
18 industry standard testing method that California  
19 relied upon to detect the presence of relevant  
20 compounds in gasoline. Methanol is included among  
21 the compounds listed, as is ETBE, an ether made

1 from ethanol, and a number of other ethers and  
2 alcohols that had not been thoroughly tested by  
3 California.

4 My next slide shows that--

5 MR. DUGAN: Is there any evidence in the  
6 record that supports that last statement? I know  
7 you cited to this list of compounds, but the stuff  
8 about the previous stuff, is there any evidence in  
9 the record? If there is, I would just like the  
10 citation to it, please.

11 MR. LEGUM: The citation to the record for  
12 what proposition?

13 MR. DUGAN: The standard that this was an  
14 industry standard for detection.

15 MR. LEGUM: Yes, Amended Statement of  
16 Defense, paragraph 149, note 267, which quotes 14  
17 JS Tab 19 at 540.

18 MR. DUGAN: I'm sorry, could you say that  
19 one more time, because it's not on this slide.

20 MR. LEGUM: Amended Statement of Defense,  
21 paragraph 149, note 267, quoting 14 JS, Tab 19, at

1 540.

2 MR. DUGAN: Thank you.

3 MR. LEGUM: Of the compounds listed, and  
4 what we have on the screen is the list of 11  
5 compounds that were included in the California  
6 conditional prohibitions definition, of those  
7 compounds, only four could legally be added to  
8 gasoline under Federal law to satisfy the oxygenate  
9 requirement. Those compounds are the three ethers  
10 and TBA, which is tertiary butanol.

11 Again, nothing in this background suggests  
12 that the intent behind the MTBE ban was to harm  
13 methanol producers.

14 And finally, the inclusion of methanol in  
15 that list of conditionally prohibited compounds had  
16 no impact on methanol producers. This is because  
17 methanol cannot legally be used as an oxygenate  
18 additive to gasoline under Federal law, as Jim  
19 Caldwell established in his undisputed witness  
20 statement. Nor can methanol practically be so used  
21 in today's automobile fleet.

1           Intent to harm methanol producers by a  
2 different ban can hardly be inferred from a  
3 conditional prohibition that had no impact on  
4 methanol producers whatsoever.

5           Mr. President, members of the Tribunal,  
6 that is it. We have just reviewed all of the  
7 evidence offered by Methanex specifically to show  
8 that California intended for the MTBE ban to harm  
9 methanol producers. Just to recap, we reviewed  
10 Robert Wright's uncorroborated double hearsay  
11 statement that California Senator John Burton told  
12 unidentified persons to short Methanex's stock. We  
13 examined the single line in a 1993 U.S. EPA  
14 publication that predicted an impact on methanol  
15 producers from a different regulation proposed by  
16 U.S. EPA at that time.

17           We considered Methanex's suggestion that  
18 it was inevitable that methanol was discussed at  
19 the August 1998 dinner because two relatives of  
20 some of the persons at the dinner had once made  
21 statements about methanol in the past. And we

1 reviewed the conditional prohibition of the use of  
2 untested oxygenates as evidence of a secret intent  
3 behind the MTBE ban.

4           All of the rest of Methanex's evidence  
5 either deals with ethanol or with MTBE. My  
6 colleague, Andrea Menaker, will address that  
7 evidence in a little while, but my point here is  
8 that none of that evidence addresses either  
9 methanol or Methanex. It therefore cannot, by  
10 definition, supply the showing of intent to address  
11 methanol producers or Methanex required by the  
12 First Partial Award. The United States  
13 respectfully submits that the evidence we have just  
14 reviewed does not even begin to overcome the  
15 presumption of regularity of governmental acts that  
16 attaches to the California measures as a matter of  
17 international law. This failure of proof alone is  
18 sufficient to compel dismissal of Methanex's claims  
19 in their entirety.

20           Unless the Tribunal has any questions, I  
21 would now like to turn to my second main point:

1 Methanex errs in suggesting that even though it has  
2 no direct evidence that California intended to harm  
3 methanol producers, the Tribunal should consider  
4 its evidence on ethanol relevant because ethanol  
5 and methanol compete as products in some sense  
6 relevant here. I will show that this suggestion by  
7 Methanex fails on legal and factual grounds.

8 First, I will show that this assertion of  
9 competition is no different from that originally  
10 pleaded by Methanex and rejected by the Tribunal in  
11 the First Partial Award. I will also demonstrate  
12 under this head of argument that the holdings of  
13 the First Partial Award are final and binding and  
14 not subject to reconsideration.

15           Second, I will demonstrate that the record  
16 does not show the competition Methanex alleges in  
17 any event.

18           Before starting, however, it's useful  
19 briefly to recall the evolution of Methanex's  
20 allegations of competition in these proceedings.  
21 This is my first slide on this subject. A Keystone

1 of both Methanex's original Statement of Claim and  
2 its Amended Statement of Claim was that methanol  
3 was sold for use as a feedstock in the production  
4 of MTBE.

5           As my next slide shows, with similar  
6 import to its allegations in the amended statement  
7 of claim, that those methanol sales would be  
8 replaced by sales from allegedly competing ethanol  
9 producers after the MTBE ban went into effect.

10           Methanex's allegations of competition,  
11 however, were based entirely on methanol's status  
12 as a feedstock for MTBE production. It did not  
13 dispute that MTBE and ethanol were the products  
14 that directly competed with each other in the  
15 market for additives to California gasoline.

16           My next slide shows the Tribunal  
17 recognized these undisputed facts in the First  
18 Partial Award. It recognized that, quote, Ethanol  
19 is an oxygenate that competes directly with MTBE,  
20 closed quote, whereas methanol is a feedstock for  
21 MTBE, closed quote. These were among the

1 allegations that the Tribunal assumed to be correct  
2 for purposes of its jurisdictional analysis. Yet  
3 the Tribunal, and this would be my next slide, in  
4 the First Partial Award found these allegations to  
5 be insufficient to establish the legally  
6 significant connection required by Article 1101(1)  
7 between the MTBE ban, Methanex, and its  
8 investments. Instead, the Tribunal found that only  
9 part of Methanex's case could fall within its  
10 jurisdiction, that part relating to the intent  
11 underlying the MTBE ban.

12           Methanex's allegations concerning methanol  
13 and ethanol sales did not comprise part of the case  
14 that provisionally survived the First Partial  
15 Award. The Award thus necessarily rejected the  
16 notion that mere cross-elasticity of demand between  
17 a feedstock, like methanol, and a downstream  
18 product, like ethanol, could supply the legally  
19 significant connection that was otherwise lacking  
20 here.

21           Methanex, then in its fresh pleading for



1 the first time asserted that methanol directly  
2 competed with ethanol. It asserted that methanol,  
3 like MTBE and ethanol, could be added to gasoline  
4 by itself to satisfy the oxygenate requirements of  
5 the Clean Air Act. We have on the screen a sample  
6 of one of Methanex's assertions to this effect. It  
7 suggested that methanol therefore competed directly  
8 with methanol and MTBE in the market for oxygenate  
9 additives to gasoline. The United States  
10 demonstrated in its Amended Statement of Defense  
11 and accompanying witness statements and expert  
12 reports that Methanex's new assertion was novel.  
13 The witness statement of Jim Caldwell in Volume 13  
14 of the joint submission of evidence showed that  
15 methanol could not be legally used as an oxygenate  
16 additive in the United States under Federal law.

17           The expert report of Bruce Burke in that  
18 same volume showed that because of its particular  
19 properties, methanol could be not practically be  
20 added to gasoline to satisfy the oxygenate  
21 requirement in today's conditions. Messrs. Burke

1 and Caldwell demonstrated that there was, and could  
2 be, no competition between ethanol and methanol in  
3 the United States.

4           In the face of this showing, Methanex, in  
5 its reply, effectively withdrew its assertion of  
6 direct competition between ethanol and methanol.  
7 The reply no longer contends that methanol can be,  
8 quote, splash-blended or otherwise mixed into  
9 gasoline as an oxygenate additive in the United  
10 States.

11           The reply narrowed its contention on  
12 competition to one subcategory of the market, those  
13 integrated refiners in California that own gasoline  
14 refining, MTBE production, and gasoline  
15 distribution facilities. It posited that because  
16 such refiners would have previously bought some  
17 methanol as a feedstock for MTBE production and  
18 will now buy ethanol to add to gasoline, methanol  
19 and ethanol therefore compete.

20           Now, Methanex's reply attempts to blur  
21 this reality by arguing that methanol and ethanol

1 are both just ingredients used in the manufacture  
2 of gasoline, but that is not what the record shows.  
3 The record shows that there are two very different  
4 kinds of oxygenated gasoline in use in the United  
5 States today. One is gasoline containing MTBE.  
6 The other is gasoline containing ethanol.

7           To put it in simple terms, Methanex may  
8 be, as a technical matter, part of the large class  
9 of chemicals classified as oxygenates, but you  
10 can't add it to gasoline. If you do at the levels  
11 required to satisfy the Federal oxygenate  
12 requirement, you will violate Federal law as shown  
13 by the witness statement of Jim Caldwell, and you  
14 will void the warranty of most cars on the market  
15 in the United States, as shown by the expert report  
16 of Bruce Burke.

17           The measures at issue here address  
18 gasoline containing a specific oxygenate. That  
19 oxygenate is MTBE. It is not methanol. Methanol's  
20 only role is as a feedstock for MTBE.

21           We thus find ourselves having gone full

1 circle on Methanex's theory of competition. The  
2 theory of competition advanced in Methanex's reply  
3 is precisely the same as that advanced during the  
4 jurisdictional phase. It is also, as I have shown,  
5 precisely the same as that rejected by the Tribunal  
6 in its First Partial Award.

7           Given this state of affairs, it is perhaps  
8 not surprising that Methanex has requested the  
9 Tribunal to reconsider the First Partial Award for  
10 the terms of that award squarely disallow  
11 Methanex's current argument on competition. I will  
12 now, therefore, briefly address Methanex's request  
13 for reconsideration.

14           PRESIDENT VEEDER: Just before you do  
15 that, can we raise a question as to how you see the  
16 nature of the exercise you've just gone through.  
17 If this were a jurisdictional phase, we would be  
18 looking at the Amended Statement of Claim for  
19 Methanex, the so-called fresh pleading, and  
20 adopting the approach that we outlined in the First  
21 Partial Award based upon the ICJ's decision in the

1 oil platforms case. We would be making certain  
2 factual assumptions in favor of Methanex, and on  
3 the basis of those assumptions we might or might  
4 not assume and exercise jurisdiction in regard to  
5 the merits.

6           If we did assume jurisdiction on the basis  
7 of assumed facts on the basis of a pleading only,  
8 and we then got to the merits, we wouldn't then  
9 make a decision to unmake our decision on  
10 jurisdiction. The Tribunals tend, when they get to  
11 the merits, decide the cases on the merits.

12           Now, in the procedure we've had to follow  
13 in this case, what's the test on Article 1101? Do  
14 we look at the fresh pleading and make certain  
15 factual assumptions, or do we deal with it  
16 essentially on findings of fact, on evidence that  
17 we now have before us?

18           MR. LEGUM: I will give a provisional  
19 answer at this time because I'd like to get the  
20 views of my colleagues on this question, but my  
21 understanding of where we are is that the Tribunal

1 has joined the jurisdictional issue to the merits,  
2 and the Tribunal's decision will be based on  
3 evidence of record on this issue as it is on other  
4 issues; but I would like to visit that issue with  
5 my colleagues, and perhaps we will have a more  
6 educated answer after the lunch break.

7           On the subject of reconsideration, the  
8 United States's position on this subject is set  
9 forth in its letter of March 30, 2004. Under  
10 Article 32(2) of the UNCITRAL Rules, the Tribunal's  
11 award is final and binding and not subject to  
12 reconsideration, as the first slide shows.

13           Methanex's first argument in response is  
14 that Article 32(2) of the UNCITRAL Rules applies  
15 only to final awards, not to interim or partial  
16 awards. The United States demonstrated the error  
17 of that view at some length in its March 30 letter.  
18 I will only briefly recap our points here.

19           My next slide: Although paragraph one of  
20 Article 32 separately references the final award  
21 and interim interlocutory or partial awards, the

1 rest of the UNCITRAL Rules do not. By using the  
2 generic term "the Award," Article 32(2) makes clear  
3 that its terms encompass each of the species of  
4 award referred to in Article 32(1).

5           Indeed, Methanex recognized that the First  
6 Partial Award was an award within the meaning of  
7 the UNCITRAL Rules by requesting interpretation of  
8 it under Article 35(1). The text of Article 35(1)  
9 is now displayed on the screen below that of  
10 Article 32(2). Methanex's current position would  
11 ascribe a different meaning to the same words, "the  
12 Award," in different articles of the same rules.  
13 Elemental principles of textual interpretation do  
14 not support such an approach.

15           Moreover, the travaux preparatoires and  
16 arbitral jurisprudence confirm that the UNCITRAL  
17 Rules' reference to "the Award" includes partial  
18 awards. Displayed on the screen as commentary on  
19 the travaux for Article 32, which states that  
20 paragraph one of that Article was included  
21 precisely to make clear that the term "award" does

1 encompass partial awards, and the Iran-U.S. claims  
2 Tribunal in the Ford Aerospace case expressly  
3 addressed whether interim awards on jurisdiction  
4 were final and binding within the mining of  
5 Article 32(2).

6           As shown in my next slide, the Tribunal  
7 concluded that an interim award on jurisdiction,  
8 quote, must be respected as binding law, closed  
9 quote.

10           Now, Methanex had an opportunity in its  
11 April 14th letter to address the points I have just  
12 restated from our March 30 letter. It did not. It  
13 made no response because there is no response.  
14 Partial awards are clearly final and binding under  
15 the UNCITRAL Rules.

16           The argument that does get considerable  
17 attention in Methanex's April 14 letter is a  
18 different one, that the Tribunal has the authority  
19 to sit in judgment of a two-year-old challenge to  
20 one of its own members and reconsider the Award on  
21 the basis of Methanex's challenge. That argument



1 fails, as a matter of law and fact.

2           First, the law. Methanex points to no  
3 provision in the UNCITRAL Rules authorizing other  
4 members of a Tribunal to address a challenge made  
5 to one member. The UNCITRAL Rules, in fact,  
6 provide precisely to the contrary. Rules grant in  
7 Article 12 the appointing authority an exclusive  
8 role in deciding such challenges.

9           And my next slide shows that, as Jacomijn  
10 van Hof notes in her discussion of the travaux  
11 preparatoires to Article 12 in her commentary,  
12 quote, The underlying principle of this Article is  
13 that a neutral third party should decide a  
14 challenge, closed quote. In fact, the drafters  
15 specifically considered and rejected the notion  
16 that challenges should be decided by the other  
17 members of the Tribunal. Methanex's attempt to  
18 ascribe such a role to the members of this Tribunal  
19 is without support in the governing rules.

20           Second, contrary to Methanex's argument,  
21 the UNCITRAL Rules expressly provide that no

1 negative inference may be drawn by the fact that an  
2 Arbitrator withdraws after a challenge.

3 My next slide shows Article 11(3) of the  
4 UNCITRAL Rules. That Article, as is clear from the  
5 text, provides that no implication of acceptance of  
6 the grounds for the challenge may be entertained.

7 Third, Methanex's claim that  
8 Mr. Christopher was biased is without support in  
9 any--in fact. My next slide shows Methanex's  
10 argument. Quote, Mr. Christopher personally  
11 pitched a case to Governor Davis after this case  
12 had commenced, and Governor Davis personally  
13 decided, over the objection of his Attorney  
14 General, to award a lucrative representation to  
15 Mr. Christopher's firm, closed quote.

16 My next slide shows what the record shows  
17 in the form of Mr. Christopher's signed statement.  
18 Quote, I did not make a personal appeal to the  
19 Governor to obtain that representation for  
20 O'Melveny over the opposition of the Attorney  
21 General, and, indeed, I have never spoken to

1 Governor Davis about the case, closed quote. The  
2 competent evidence of record provides no support  
3 here, as elsewhere, for the charges Methanex  
4 advances.

5           Methanex makes two other arguments on  
6 consideration that I will address briefly. The  
7 first is based on a single paragraph in its fresh  
8 pleading of November 2002; that paragraph  
9 complained about the reasoning of the First Partial  
10 Award. It is now displayed on the screen in my  
11 next slide.

12           Note that the statement--note the  
13 statement which we have underlined that, quote,  
14 Methanex does not seek to relitigate that decision,  
15 closed quote. Methanex now contends that this  
16 paragraph was an objection, to use their words,  
17 that amounted to a request for reconsideration,  
18 even though no reconsideration was requested  
19 anywhere in that pleading.

20           My next slide shows Methanex's argument  
21 quoted from their April 14 letter. I will pause

1 for a moment to allow the Tribunal to digest it.

2           Here is what they are arguing. Even  
3 though Methanex did not ask for reconsideration,  
4 even though the UNCITRAL Rules do not provide for  
5 reconsideration, and even though the very paragraph  
6 that they rely upon expressly says they don't want  
7 to relitigate the First Partial Award, the Tribunal  
8 should have, sua sponte, divined that this single  
9 paragraph in their fresh pleading nonetheless was,  
10 in fact, an attempt to relitigate the Award and  
11 ruled upon it. And, they assert, the United States  
12 waived any objection by similarly failing to  
13 recognize that this single paragraph was a request  
14 for reconsideration.

15           Merely to state this argument is to reveal  
16 its lack of merit. It has become a familiar tactic  
17 for Methanex to blame the Tribunal or the United  
18 States for its own failure to press its case within  
19 the limits set by the governing Arbitration Rules  
20 and the Tribunal's order. The tactic is as  
21 regettable as it is unmeritorious.

1           The final argument by Methanex in support  
2 of the Tribunal's authority to reconsider the First  
3 Partial Award is that neither disputing party  
4 supports the legal standard adopted by the Tribunal  
5 in that award. As the United States's rejoinder  
6 makes abundantly clear, however, it is the United  
7 States's view that the First Partial Award  
8 correctly states the law on Article 1101(1). We  
9 fully support the standard that was adopted.

10           There is, in sum, no support for  
11 Methanex's assertion that the Tribunal has  
12 authority to reconsider the First Partial Award.  
13 That award is final and binding. Its reasoning  
14 disposes of Methanex's claim that methanol as a  
15 feedstock for MTBE competes with ethanol as an  
16 additive to gasoline. That claim, therefore, is  
17 without merit, as a matter of law.

18           Unless the Tribunal has any questions on  
19 the subject of reconsideration or the finality of  
20 the First Partial Award, I will move to my final  
21 point.

1           Methanex has, in any event, made no  
2   serious attempt to prove the competition it asserts  
3   between methanol or ethanol in a market for  
4   integrated refiners in California. The record  
5   notably is silent on a number of points essential  
6   to this assertion. First, the record does not  
7   establish that there are refiners in California  
8   that are integrated in the sense that the same  
9   company owns refineries, MTBE production  
10   facilities, and distribution terminals. What the  
11   record does show is that those--that both the  
12   physical structure of the California gasoline  
13   distribution system and its ownership structure are  
14   highly complex. There is no basis for assuming  
15   here what the record does not show.

16           Second, the record does not establish that  
17   there is a market with respect to any such  
18   integrated refiners in which methanol and ethanol  
19   can be considered to compete in an economic sense.  
20   Notably absent here is the kind of comprehensive  
21   economic testimony that is familiar in those

1 contexts, such as some competition law  
2 applications, where it may be appropriate to  
3 consider an upstream input for a product to compete  
4 with downstream finished products. It is difficult  
5 to take seriously Methanex's desire to engraft a  
6 competition law approach onto the investment  
7 chapter when that attempt is not accompanied by any  
8 supporting economic evidence.

9           Third, what evidence there is merely  
10 confirms that participants in the market view  
11 methanol as no more than a feedstock with gasoline  
12 containing MTBE and gasoline containing ethanol.

13           The single unsigned, undated contract with  
14 one refiner that Methanex offers makes clear that  
15 the methanol to be sold was for use in Valero's,  
16 and I'm quoting the contract, production of or  
17 demand for MTBE in California, close quote. And  
18 the chart that Methanex offered yesterday at Tab 7  
19 of its hearing book, the Tribunal will recall that  
20 it was the one with lines for methanol and ethanol  
21 that crisscrossed each other, that chart was based

1 solely on data for MTBE and ethanol, on data for  
2 use of those two substances in California.

3 It is telling that Methanex--

4 ARBITRATOR REISMAN: Would you tell us  
5 that again.

6 MR. LEGUM: It was at Tab 7 of Methanex's  
7 hearing book yesterday.

8 The chart relied on data from a California  
9 governmental study of ethanol, which is in the  
10 record, and it also relied on a February 2004  
11 document that is not in the record that is a  
12 California government document addressing MTBE use  
13 in California.

14 PRESIDENT VEEDER: Could you take your  
15 criticisms of this a little bit more slowly.

16 MR. LEGUM: Oh, sorry.

17 PRESIDENT VEEDER: No, no, it's helpful,  
18 but let's just look at Tab 7 that we had yesterday.

19 MR. LEGUM: I remember it fairly well.

20 PRESIDENT VEEDER: And it's entitled  
21 Binary Choice, and the red line is marked ethanol,



1 but the blue line is marked methanol, not MTBE.

2 MR. LEGUM: That's correct. And if you  
3 look at the source for that information, the source  
4 is a study of ethanol, which is in the record,  
5 there is a record cite for that, and then there is  
6 a quarterly report on MTBE that is not in the  
7 record, but there are earlier versions of that same  
8 report that are in the record.

9 What Methanex did, as I understand it, is  
10 they said, well, methanol is used as a feedstock  
11 for MTBE, and there is roughly .34 units of  
12 methanol for every unit of MTBE, so they've backed  
13 out from the figures for MTBE how much methanol  
14 would have been used as a feedstock to produce that  
15 MTBE.

16 As I was saying, Methanex relied on data  
17 for MTBE to arrive at this conclusion because it  
18 couldn't find the document, it seems, that shows  
19 comparative data for methanol and ethanol use in  
20 the California gasoline market. That is because  
21 methanol and ethanol are not seen by participants

1 to compete in that market.

2           Mr. President, members of the Tribunal,  
3 the U.S. rejoinder details a number of other ways  
4 in which the evidentiary record fails to support  
5 Methanex's claim of competition in the market for  
6 integrated refiners, but unless the Tribunal has  
7 any further questions, I would propose now to turn  
8 the floor over to Mr. Pawlak, who will address the  
9 scientific evidence and its relevance to the issues  
10 here.

11           PRESIDENT VEEDER: We have no questions at  
12 this stage, Mr. Legum. It's now 12:20, and if  
13 Mr. Pawlak wants to start now, he can start now, or  
14 we can break and try to resume earlier.

15           MR. LEGUM: Time flew, and I think that we  
16 should break now. So, we'll resume at what time?

17           PRESIDENT VEEDER: Let's break now and  
18 resume, then, at 20 past two, but we may want to  
19 bring our meeting forward by a few minutes if we  
20 could meet at 10 to two on the tenth floor for the  
21 matter which concerns us.

1           MR. LEGUM: Thank you very much.

2           (Whereupon, at 12:22 p.m., the hearing  
3 was adjourned until 2:20 p.m., the same day.)

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1                   AFTERNOON SESSION

2                   PRESIDENT VEEDER:  Let's resume.

3                   MR. BETTAUER:  It is now Mr. Pawlak's  
4 turn to continue on the relating to argument.

5                   PRESIDENT VEEDER:  Mr. Pawlak.

6                   MR. PAWLAK:  Thank you.

7                   Good afternoon, Mr. President, members of  
8 the Tribunal.  As Mr. Bettauer mentioned this  
9 morning, I will address the scientific evidence in  
10 the record before you.  As I will demonstrate,  
11 there is no basis to question the soundness of the  
12 science before the California officials that form  
13 the basis for their decision to ban MTBE.

14                  Before I begin, it is important that I put  
15 my review of the science in its proper context.  
16 The time that will be devoted to the science  
17 underlying the MTBE ban during this hearing is  
18 disproportionate to its relevance to the issues in  
19 this case.  In addition to my presentation today,  
20 later in these proceedings, the Tribunal will hear  
21 from four U.S. witnesses who have addressed the

1 science underlying California's decision. On  
2 Friday, Drs. Anne Happel and Graham Fogg will be  
3 present to respond to questions regarding their  
4 respective expert reports on MTBE's contamination  
5 of groundwater.

6           Also on Friday, the Tribunal is scheduled  
7 to hear from Dean Simeroth of California's Air  
8 Resources Board regarding air quality issues. On  
9 Monday, economist Dr. Ed Whitelaw will testify  
10 regarding the economics of the MTBE ban.

11           Despite the substantial time devoted to a  
12 review of the science supporting the ban, the  
13 United States reiterates its view that the  
14 scientific record regarding the ban is, at best, of  
15 very limited relevance to the issues before this  
16 Tribunal.

17           Allow me to explain.

18           There is no dispute between the parties  
19 that the UC report did, in fact, support the 1989  
20 Executive Order's finding that MTBE posed a  
21 significant risk to the environment. The

1 Governor's decision to request a timetable for the  
2 phaseout of MTBE, therefore, was in full accord  
3 with the scientific conclusions in the record  
4 before the Governor's office.

5           We address here today the scientific basis  
6 for the California measures only because Methanex  
7 has alleged that California officials were secretly  
8 out to get methanol producers, even though those  
9 officials said they adopted the measures out of  
10 concern over the MTBE contamination of California's  
11 groundwater.

12           To maintain its theory, Methanex would  
13 have to prove two theses: First, that the science  
14 regarding MTBE before the decision makers was a  
15 sham, a sham that merely covered up the secret  
16 intent of the ban. And, second, that the Governor,  
17 and other California officials knew that the  
18 science was lacking foundation, but proceeded with  
19 the decision to eliminate MTBE anyway. Methanex  
20 has proven neither thesis.

21           As I will demonstrate, Methanex has not

1 established any basis to question the science of  
2 the scientific conclusions. Similarly, Methanex  
3 has not established any basis to question the  
4 California decision makers' good-faith reliance on  
5 those scientific conclusions in taking action to  
6 protect California's groundwater.

7           During the next several minutes, I will  
8 highlight the record on the scientific evidence.  
9 In the first part of my presentation, I will  
10 establish the bona fides of the UC report which  
11 amply supported the decision to ban MTBE.

12           To conclude the first part of my  
13 presentation, I will rebut the claim advanced by  
14 Methanex that California improperly singled out  
15 MTBE for regulation. In the second part of my  
16 presentation, I will consider the reports offered  
17 by the scientific experts. Those reports support  
18 the conclusion that the MTBE ban was intended to  
19 address water contamination.

20           Allow me to begin by considering the UC  
21 report. Mr. Clodfelter, as you'll recall from this

1 morning, reviewed some of the findings and  
2 recommendations of that report. I will revisit the  
3 report explaining that there is no basis to  
4 question its conclusions or findings.

5 I will also highlight in somewhat greater  
6 detail some of the key findings in the UC report.  
7 As we have heard, Methanex has not disputed that a  
8 highly credentialed, multi-disciplinary team of  
9 more than 60 tenured researchers authored the UC  
10 report.

11 Nor does Methanex dispute that the UC  
12 reports' authors worked independently and in good  
13 faith in preparing 17 distinct papers that were  
14 compiled in five volumes. Each of those papers  
15 covered distinct issues relevant to the  
16 determination of the severity of the threat posed  
17 by MTBE to California's water resources. Methanex  
18 nevertheless complains that the report was  
19 underfunded, incomplete, and wrong on many critical  
20 points. These complaints, none of which Methanex  
21 has begun to prove, could not establish a finding



1 that the science underlying the MTBE ban was a  
2 sham, much less that Governor Davis and many other  
3 California officials knew of but ignored that fact.

4           In any event, for the reasons that I now  
5 will explain, there is no support for Methanex's  
6 assertions. First, several other highly respected  
7 sources contemporaneously issued similar research  
8 results and thus confirmed the good-faith nature of  
9 the UC report. For example, if you will look to  
10 the screen or turn to the slide numbered number  
11 five in your packets, by July 1999, the United  
12 States Environmental Protection Agency's Blue  
13 Ribbon Panel on Oxygenates and Gasoline had issued  
14 conclusions and recommendations similar to those of  
15 the UC report. As you see on the next slide, so  
16 too did the Northeast States for Coordinated Air  
17 Use Management, also in 1999.

18           And in April 2000, Denmark's Environmental  
19 Protection Agency added MTBE to its list of  
20 undesirable substances, indicating its view that,  
21 quote, Use of the substance should be limited as

1 much as possible, end quote.

2           The fact that these other esteemed  
3 scientific research groups reached similar  
4 conclusions confirms that the UC report was no  
5 pretextual exercise.

6           Second, despite Methanex's assertions to  
7 the contrary, other government agencies in the  
8 United States widely praised the UC report. The  
9 California Senate bill calling for the study of  
10 MTBE, that is, Senate Bill 521, explicitly required  
11 that appropriate federal agencies have an  
12 opportunity to review and comment on the UC report.  
13 Those agencies' comments became part of the public  
14 record. Let me highlight a few of those comments  
15 for you.

16           As you will see on slides eight and nine,  
17 as well as on the screen at your right, the U.S.  
18 Geological Survey, for example, congratulated the  
19 University of California faculty on the UC report,  
20 noting that it contains an impressive amount of  
21 information and research that will prove useful in

1 addressing the complex issues associated with MTBE  
2 use.

3           On the next pair of slides, we see that  
4 the U.S. Department of Health and Human Services  
5 stated that the UC report was very well written and  
6 very thoughtful in its presentation of the most  
7 currently available information. And on the next  
8 slide we see that the Oak Ridge National Laboratory  
9 reported that, quote, It is clear that the salient  
10 references are cited and that detailed analyses  
11 have been performed.

12           The reviews of the UC report, such as  
13 those that I have highlighted here, make it clear  
14 that its scientific conclusions were no sham.

15           Finally, Methanex's complaints that the UC  
16 report was underfunded and incomplete provide no  
17 basis for finding any violation of international  
18 law.

19           International law does not set minimum  
20 amounts that states must spend on scientific  
21 research before science-based regulatory measures

1 may be adopted. Indeed, given the limited  
2 resources available to many states, the approach  
3 suggested by Methanex would effectively bar many  
4 developing states from adopting measures to protect  
5 the environment.

6           That is not, however, the law. In any  
7 event, the amount appropriated for the UC report,  
8 \$500,000, was far from insubstantial. Methanex  
9 itself has not disputed that the funding for the UC  
10 report was sufficient to address two principal  
11 areas of inquiry, one, the human health impacts of  
12 MTBE, and two, the environmental impacts and  
13 benefits of MTBE.

14           More importantly, the report addressed the  
15 problem of MTBE contamination in a systematic  
16 manner. Substantively the UC report provided ample  
17 scientific evidence supporting the ban of MTBE.  
18 California officials were well aware that gasoline  
19 containing MTBE was stored in volume underground,  
20 in close proximity to water resources at tens of  
21 thousands of locations throughout the state.

1           Allow me to highlight on the projection  
2 screen at your right the record on these points.  
3 If you would like to refer to your packet, page 14  
4 of the packet is the first slide.

5           First, in 1998 and '99, the California  
6 fuel supply consumed each day on average over 4.3  
7 million gallons of MTBE. That daily volume of  
8 consumption would fill more than five Olympic-size  
9 swimming pools or about half of an oceangoing  
10 supertanker.

11           Next, on slide 15, you see as of 1999,  
12 California was home to more than 45,000 operating  
13 underground storage tank systems, and by that I  
14 mean tanks used as a source for refueling.

15           On the next slide, slide 16, it is clear,  
16 that in addition, as of early 1999, just seven  
17 years after widespread use of MTBE had begun in  
18 California, MTBE had been shown to have polluted  
19 groundwater and more than 4,000 underground fuel  
20 tank sites. Allow me to take a minute to explain  
21 what this slide represents. The dots on the map

1 reflect leaking underground fuel tank sites.  
2 Leaking underground fuel tank sites are those that  
3 were identified to have released gasoline into the  
4 subsurface environment and thus became subject to  
5 regulation and monitoring. The color coding of  
6 these dots reflects the status of testing for MTBE  
7 in groundwater at those leaking fuel tank sites.  
8 And as you will see, the red dots represent the  
9 4,000-plus tank sites where MTBE had been shown to  
10 have polluted groundwater. These are actual  
11 detections. As of 1999, nearly 10,000 leaking tank  
12 sites had not yet even been analyzed for MTBE, and  
13 that is reflected in the yellow dots.

14 Now, as you will see on the next slide,  
15 more than 50 percent of those 4,000-plus leaking  
16 tank sites were located within one-half mile of a  
17 public drinking water well. Again, allow me to  
18 explain this slide. The dots here, on slide 17,  
19 reflect something different than they do on the  
20 previous screen. Here, the dots represent public  
21 drinking water supply wells. There are about

1 22,000 such public wells in California. The darker  
2 red dots reflect a well that is within just  
3 one-half mile of ten or more tank sites that leaked  
4 MTBE into groundwater. Similarly, the lighter red  
5 dots reflect a public drinking well within four to  
6 nine tank sites that leaked MTBE into groundwater.

7           In short, the point here on this slide is  
8 a vulnerability analysis, as Dr. Fogg explains in  
9 his expert reports. The arrival of just a fraction  
10 of the known thousands of instances of MTBE  
11 contamination to nearby water supply wells would  
12 result in a serious drinking water contamination  
13 problem for affected communities.

14           Finally, as Dr. Happel has explained in  
15 her written testimony, despite California's strict  
16 requirements for underground storage tanks,  
17 upgraded underground storage tank systems were  
18 continuing to leak. Additionally, again, as  
19 reflected on the projection screen to your right,  
20 or slide 18 in the packet, the UC report made it  
21 clear to California officials what effect MTBE had

1 on the state's water resources and consumers. The  
2 UC report stated: The taste of MTBE has been  
3 described as objectionable, bitter, solvent-like,  
4 and nauseating.

5           And in the next slide, the taste and odor  
6 properties of fuel oxygenates in drinking water is  
7 of primary importance to the consumers as well as  
8 suppliers of drinking water. The report further  
9 informed California officials that members of the  
10 public may become worried or stressful over the  
11 safety of contaminated water. For example, a  
12 parent may be hesitant to use water with a strong  
13 taste and odor for children because of safety  
14 concerns. Subjective acute effects may result from  
15 public reaction to the unpleasant taste and odor of  
16 MTBE-containing drinking water.

17           As the United States has demonstrated in  
18 its written submissions, as of January 1999,  
19 California law prohibited its public water agencies  
20 from delivering to consumers drinking water that  
21 contains MTBE in excess of five parts per billion.



1 Five parts per billion is the equivalent of merely  
2 one and one-half tablespoons in an Olympic-size  
3 swimming pool. As the United States has also set  
4 out in its written submissions, California  
5 officials were aware that concentrations of MTBE  
6 much greater than five parts per billion had been  
7 detected in several areas of California.

8           For example, in a 1999 study, as we heard  
9 briefly from Mr. Clodfelter this morning, the Santa  
10 Clara Valley Water District detected MTBE at levels  
11 as high as 200,000 parts per billion, and that  
12 detection was in groundwater underneath gasoline  
13 service stations that had already upgraded their  
14 underground storage tanks to comply with  
15 California's strict 1998 tank regulations.

16           Contrary to Methanex's suggestion  
17 yesterday, a focus on upgrading underground storage  
18 tanks would not have solved the MTBE problem. For  
19 the record, I note that the Tribunal may find a  
20 discussion of the Santa Clara study in Dr. Happel's  
21 rejoinder expert report, 24 JS tab C at pages 10

1 and 11.

2           As U.S. experts Dr. Fogg and Happel  
3 explain, California has seen only the beginning of  
4 MTBE's impacts to groundwater. Recall that it was  
5 only in 1992 that MTBE became widely used as an  
6 oxygenate additive in California. As those impacts  
7 are fully realized, increasing numbers of Santa  
8 Clara and others throughout California risk finding  
9 that water runs putrid every time that they take a  
10 glass of water, wash their clothes, water their  
11 lawns, boil their vegetables or bathe their  
12 children. California's ban on the use of MTBE in  
13 gasoline merely eliminated a source of future  
14 additional MTBE contamination of California's water  
15 resources.

16           Given the findings of the UC report, and  
17 the consistent results from several other research  
18 efforts that I highlighted a moment ago, the  
19 Tribunal should reject Methanex's claim that  
20 California singled out one contaminant among many  
21 in its decision to ban MTBE.

1           To support its assertion, you'll note a  
2 familiar slide from yesterday on the screen and at  
3 pages 21 and 22 of your packet. This appears at  
4 page 39 of Methanex's reply brief. Methanex relies  
5 on this single table listing contaminants in  
6 California groundwater to claim essentially that  
7 California's adopting an MTBE ban without first  
8 enacting a ban of other contaminants somehow  
9 evidences that California improperly targeted MTBE.

10           Methanex is mistaken for several reasons.  
11 First, California has acted to protect its  
12 groundwater from benzene by imposing restrictions  
13 on the benzene content of gasoline that are more  
14 severe than those imposed by the Federal  
15 Government. In addition, benzene is a fundamental  
16 component of gasoline, whereas MTBE is not. As  
17 expert witness Bruce Burke testified in his  
18 rejoinder report, the complete removal of benzene  
19 from gasoline would be cost-prohibitive.

20           Additionally, consider, for example, the  
21 testimony on the screen at your right that was

1 presented to the California Senate in December  
2 1997. This is at page number 23 of your packet.  
3 Santa Monica's Director of Environmental and Public  
4 Works Management testified to the California  
5 Senate, quote, It is important to note that  
6 benzene, which has been a constituent in gasoline  
7 for several decades, is rarely detected in wells,  
8 yet MTBE in a few short years of use has already  
9 managed to knock out 71 percent of Santa Monica's  
10 wells.

11 Dr. Anne Happel's expert report confirms  
12 the findings now presented on the screen. As  
13 Dr. Happel also confirmed, quote, Data from many  
14 sources demonstrate that MTBE poses a risk of  
15 contaminating groundwater, a higher risk of  
16 contaminating groundwater than other gasoline  
17 constituents, end quote. As a result, Methanex is  
18 wrong to suggest that California somehow was  
19 obligated to address other groundwater contaminants  
20 in the same manner as it addressed MTBE.

21 Finally, even assuming Methanex had

1 established its assertion that California acted  
2 against MTBE to the exclusion of other  
3 contaminants--and, of course, it has  
4 not--California could not be faulted. To do so  
5 would preclude governments from responding to any  
6 problem without responding to all problems of a  
7 similar type. Methanex does not offer any  
8 international law support for such a proposition.

9           In summary, there is no basis for  
10 Methanex's claims that California officials somehow  
11 improperly singled out MTBE. California officials  
12 had ample reason to accept the soundness of the  
13 scientific conclusions regarding MTBE that were  
14 before them. No evidence even remotely suggests  
15 that the science underlying the ban was a sham.

16           Allow me now to turn to the disputing  
17 parties' scientific expert testimony. As I  
18 mentioned, the Tribunal will hear from experts  
19 Dr. Anne Happel and Graham Fogg, as well as Dean  
20 Simeroth of the California Air Resources Board on  
21 Friday and Dr. Ed Whitelaw next Monday. However,

1 as I mentioned at the outset of the presentation,  
2 the disputing parties' scientific expert reports  
3 are irrelevant to the question of intent before  
4 this Tribunal. None of the California decision  
5 makers had access to the expert reports when the  
6 measures were adopted.

7           As was pointed out in a question put to  
8 Methanex yesterday, even assuming Dr. Williams's  
9 analyses are correct--and we submit that they are  
10 seriously flawed--California was not acting on  
11 Dr. Williams's analyses. It was acting on the  
12 conclusions of the UC report and its related public  
13 testimony.

14           The criticisms of the UC report, in the  
15 report submitted by Methanex, shed no light,  
16 therefore, on the motivations behind the challenged  
17 measures. The reports of U.S. experts Dr. Fogg,  
18 Happel and Whitelaw, as well as the statement of  
19 Dean Simeroth, each demonstrate that the central  
20 conclusions contained in the UC report were valid  
21 and provided an appropriate basis for California's

1 action. Each responds in detail to the contrary  
2 assertions and conclusions asserted by Methanex's  
3 experts.

4 Dr. Fogg, our first witness, who I believe  
5 will testify in the afternoon on Friday, is  
6 Professor of Hydrogeology at the University of  
7 California at Davis. He is one of the world's  
8 leading authorities on the fate and transport of  
9 contaminants in groundwater. Among his many  
10 accomplishments, Dr. Fogg was the geological  
11 Society of America's 2002 Bird Saul Dries  
12 distinguished lecturer, which is awarded to one  
13 hydrologist each year. Just a few years before  
14 receiving that distinguished award, Dr. Fogg  
15 completed his work as co-author of the UC report.

16 As Dr. Fogg stated in his December 2003  
17 expert report, his, quote, general opinions and  
18 conclusions regarding past, present, and potential  
19 MTBE impacts on groundwater remain unchanged from  
20 those that I presented in the UC report, end quote.

21 In this case Dr. Fogg's expert reports

1 make clear that Methanex's critique of the UC  
2 report ignores the unique demands placed on  
3 groundwater in California, with its desert climate  
4 and exploding population. Dr. Fogg demonstrates  
5 that thousands of public drinking water wells are  
6 vulnerable to MTBE contamination. He also explains  
7 that Methanex's experts ignore entirely the more  
8 than 450,000--that is 450,000 private water wells  
9 located in California. The UC report made clear  
10 that private wells are even more vulnerable to MTBE  
11 contamination than public wells, and those private  
12 wells are generally not monitored in the California  
13 Department of Health Services database, which is  
14 analyzed by Dr. Williams.

15           It is Dr. Fogg's view that Methanex's  
16 expert reports underestimate the MTBE problem.

17           Regarding MTBE remediation from  
18 groundwater, Dr. Fogg's written testimony  
19 concludes, quote, Cleanup of groundwater  
20 contamination is difficult, costly, and sometimes  
21 impossible, end quote.



1           Dr. Happel has written testimony concurs  
2 as to the gravity of the MTBE problem. Dr. Happel  
3 earned her doctorate from Harvard University, and  
4 she will be here to testify on Friday. Prior to  
5 her service, as just one of 14 members of the U.S.  
6 EPA's Blue Ribbon Panel on Oxygenates, Dr. Happel  
7 produced a ground-breaking study of MTBE while  
8 serving as a tenured scientist at the Lawrence  
9 Livermore National Laboratory. It is on account of  
10 that study that Dr. Happel became a nationally  
11 recognized expert on MTBE in California  
12 groundwater.

13           Dr. Happel's Lawrence Livermore National  
14 Lab research on MTBE was broadly supported. That  
15 research was funded by, among others, the Western  
16 States Petroleum Association and the American  
17 Petroleum Institute. As Dr. Happel points out in  
18 her expert report, her 1998 Lawrence Livermore  
19 research served in part to inform California EPA,  
20 and, in turn, Governor Davis's office regarding the  
21 MTBE issue prior to the ban.

1           In this case, Dr. Happel's expert reports  
2 detail California's role in leading the nation in  
3 the regulation and testing of underground storage  
4 tanks. Like Dr. Fogg, she confirms that even  
5 upgraded, strictly monitored tanks could and do  
6 continue to leak. Dr. Happel also addresses  
7 Methanex's claims that MTBE contamination of  
8 California groundwater is not widespread.

9           As you see up on your right, as well as on  
10 slide 24 in your packet, by reviewing actual  
11 California data, Dr. Happel finds that there are  
12 nearly 10,000 sites reporting MTBE pollution in  
13 groundwater. Based on that data, Dr. Happel  
14 estimates that 10,000 to 15,000 leaking underground  
15 storage tank sites have polluted groundwater  
16 throughout California. Dr. Happel thus concludes  
17 the extent and magnitude of MTBE pollution in  
18 California's groundwater is indeed significant,  
19 widespread, and worse than predicted by the UC  
20 report.

21           The United States third witness is Dean

1 Simeroth of California's Air Resources Board.  
2 Mr. Simeroth's written testimony rebutted  
3 Methanex's claim that the ban of MTBE is suspect  
4 because it will negatively impact air quality in  
5 California. As Mr. Simeroth explained,  
6 California's regulations required that the use of  
7 methanol-oxygenated gasoline not result in any  
8 backsliding in California's emissions standards.  
9 In its reply, Methanex did not dispute that its  
10 earlier allegations of increased air pollution  
11 associated with ethanol were erroneously based on  
12 an analysis of gasoline that did not meet  
13 California's specifications.  
14 Dr. Williams's reply report stated, quote,  
15 California's stringent air quality standards may,  
16 in fact, prevent ethanol fuel blends from producing  
17 negative air quality impacts. Methanex's  
18 assessment yesterday of the increased air pollution  
19 associated with ethanol use is not borne out by the  
20 record.  
21 The United States's fourth expert witness

1 is economist Dr. Ed Whitelaw. Dr. Whitelaw rebuts  
2 Methanex's claims that the MTBE ban was not  
3 cost-beneficial and, therefore, must reflect a  
4 nefarious intent. He will testify on Monday of  
5 next week. Dr. Whitelaw, Professor of Economics,  
6 at the University of Oregon, earned his Ph.D. from  
7 MIT in 1968. His reports in this case establish  
8 that California's decision to ban MTBE is  
9 consistent with the information available on costs  
10 and benefits in 1999 and 2000. Dr. Whitelaw also  
11 establishes the limitations of cost-benefit  
12 analysis as a policy-making tool where policy  
13 choices based on substantial unquantified or  
14 non-monetized factors must be made.

15 In Dr. Whitelaw's rejoinder report he  
16 reviews the substantial downside risks of the  
17 continued use of MTBE that were recognized by  
18 California decision makers prior to the band.  
19 Dr. Whitelaw then frames the question presented to  
20 California officials this way, and you can look at  
21 slide 26 or at the screen to your right, for the

1 excerpt from Dr. Whitelaw's rejoinder report: He  
2 writes: Is the benefit of eliminating once and for  
3 all the considerable uncertainty surrounding MTBE's  
4 future ability to contaminate California's  
5 groundwater assets worth the risk of increasing  
6 gasoline prices by about three cents per U.S.  
7 gallon. California, Dr. Whitelaw explains,  
8 answered, yes, it is beneficial to eliminate the  
9 risk posed by MTBE at a cost of a mere three cents  
10 per gallon of gasoline. Dr. Whitelaw's reports  
11 detail that California's decision was economically  
12 wise and rational.

13 In summary, substantively there is no  
14 question that the reports offered by the United  
15 States's experts have rebutted those offered by  
16 Methanex. The MTBE problem was no illusion.

17 Further, contrast Methanex's expert  
18 submissions to those offered by the United States.  
19 By its order of June 1, 2004, the Tribunal admitted  
20 into evidence Methanex's reports that were the  
21 subject of the United States's motion to exclude.

1 However, the many defects in Methanex's reports  
2 remain, and those defects substantially diminish  
3 their weight. Consider, for example, that  
4 Dr. Williams's firm has been retained by Methanex  
5 since at least 1989. Consider, also, that it is  
6 principally Dr. Williams on whom Methanex has  
7 relied, essentially, to claim that more than 60  
8 professors who authored the UC report engaged in a  
9 vast conspiracy.

10           The United States respectfully submits  
11 that the Tribunal should take into account  
12 Dr. Williams's failures of disclosure in assessing  
13 the weight that is due the several reports authored  
14 in whole or in part by Dr. Williams.

15           The submissions of Methanex's cost-benefit  
16 analyst, Dr. Gordon Rausser, also are suspect. His  
17 report in this case is virtually the same as one he  
18 prepared for an MTBE producer in 2001. As you will  
19 see on the screen, or on slide 28 in your packet,  
20 Dr. Rausser, quote, accidentally included in the  
21 Methanex report information based largely on the

1 earlier estimate of the costs of an MTBE ban in  
2 California. He had prepared that estimate for the  
3 MTBE producer.

4 A Federal Court recently held that  
5 Dr. Rausser's testimony in support of other MTBE  
6 interests on the economic impacts of a New York law  
7 banning MTBE was, quote, speculative and has  
8 insufficient evidentiary support, end quote.  
9 Although the slide is not particularly clear there,  
10 the one in your packet should make clear the  
11 excerpt from Dr. Rausser's reply report.

12 PRESIDENT VEEDER: Just help us with the  
13 reference there.

14 MR. PAWLAK: Certainly. That is from 20  
15 JS--

16 PRESIDENT VEEDER: No, the one, the--

17 MR. PAWLAK: That is from 20 JS. That's  
18 Dr. Rausser's report.

19 PRESIDENT VEEDER: If you could put the  
20 slide up again.

21 MR. PAWLAK: Oh, certainly. There it is.

1           PRESIDENT VEEDER: Thank you very much.

2           MR. PAWLAK: There have been several other  
3 courts that have rejected Dr. Rausser's testimony  
4 as unreliable, speculative, and unsubstantiated by  
5 the evidence. Similarly, Dr. Rausser's reports in  
6 this case are due little, if any, weight.

7           In summary then, to the extent the  
8 scientific expert reports have any relevance to the  
9 question of California's intent in adopting the  
10 MTBE ban, they support a finding that California's  
11 intention was just what California officials said  
12 it was, to protect Californians from a significant  
13 threat to their water resources. Methanex's  
14 competing reports do not begin to establish a  
15 record on which this Tribunal could conclude that  
16 California adopted the ban to target methanol  
17 producers.

18           Before I conclude, I will address briefly  
19 two additional points that Methanex raised  
20 yesterday. First, I'll explain that Methanex's  
21 reliance to the European Union's approach to the



1 MTBE issue is misplaced. Second, I will address  
2 Methanex's statements of yesterday that there is no  
3 credible evidence that MTBE poses a health concern.

4 First, the European Union. Contrary to  
5 Methanex's suggestion, the European commission did,  
6 in fact, find that, quote, There is a need for  
7 specific measures to limit the risks, end quote, of  
8 MTBE contamination of groundwater. Thus far, the  
9 EU has taken a different approach to the recognized  
10 threat of MTBE, based on that region's topography,  
11 climate, population, and other factors. Europe's  
12 approach says nothing about the appropriateness of  
13 California's ban. The evidence of record  
14 identifies the unique circumstances confronted by  
15 California decision makers. For example, in dry  
16 years, Californians can rely on groundwater for up  
17 to two-thirds of their total water consumption.  
18 With California's population expected to grow by  
19 more than 30 percent by the year 2020, the state's  
20 reliance on groundwater resources will increase  
21 dramatically.

1           Moreover, Methanex is wrong in its claims  
2   that, in some places in Europe, MTBE is used more  
3   widely than in the U.S. Unlike U.S. legislation,  
4   EU legislation does not mandate the use of  
5   oxygenates in gasoline. In Europe, MTBE is used  
6   primarily as an octane booster and at substantially  
7   lower concentrations than it was used in  
8   California.

9           Consider the graphic up at your right or  
10   at page 29 of your packet. California's  
11   consumption of MTBE amounted to almost double the  
12   volume consumed by 16 European countries combined.  
13   Further, Methanex's claim yesterday that Finland  
14   uses MTBE, quote, at substantially higher  
15   concentrations than the United States, end quote,  
16   is not accurate.

17           Slide 30 in the packet as well as the  
18   slide up at your right, makes this fact plain.  
19   This figure is found in Dr. Fogg's expert rejoinder  
20   report at 24 JS tab B, page 84. As you will see,  
21   its average MTBE content of gasoline in Finland in

1 1997 was only 8.5 percent by weight. Finland's  
2 range concentration is much greater than the 1.9  
3 percent by weight, European Union average. In  
4 contrast, the MTBE content in California gasoline  
5 was about 11 percent by weight. So, clearly  
6 Methanex's assertions yesterday are not correct.

7           Methanex has offered no basis to conclude  
8 that California was required to address MTBE's  
9 recognized risks to groundwater in the same manner  
10 that European Union policy makers have decided to  
11 address those risks.

12           Finally, allow me to turn now to address  
13 briefly Methanex's claims that MTBE is neither  
14 toxic nor carcinogenic.

15           Of course, it bears emphasis that  
16 California banned MTBE principally because of its  
17 threat to the potability of drinking water, not  
18 because of findings that MTBE was toxic or  
19 carcinogenic. However, yesterday Methanex was  
20 asked to explain how California's primary maximum  
21 contaminate level for MTBE of 13 parts per billion

1 squares with its statements that MTBE is not a  
2 health threat.

3           In response, Methanex stated, among other  
4 things, I would be willing to say, this is quoted,  
5 I would be willing to say, there is no credible  
6 evidence that anybody has gotten sick or adversely  
7 affected by MTBE in the water, end quote. Methanex  
8 reiterated. But, again, I don't think there is any  
9 credible evidence that anyone has been adversely  
10 affected by drinking water at this level, end  
11 quote.

12           Contrast Methanex's assertions to the  
13 views of the Board of Scientific Counselors to the  
14 United States National Toxicology Program. For the  
15 record, the Tribunal may find a set of the meeting  
16 minutes of the Board that I will refer to at 25 JS  
17 Tab 19 at page 3124. At the Board's meeting held  
18 in December 1998, five out of 12 scientists with  
19 one abstention on the National Toxicology Program's  
20 Board of Scientific Counselors Voted to list MTBE  
21 in their report on carcinogens as, quote,

1 reasonably anticipated to be a human carcinogen.

2           Similarly, a review committee for that  
3 report at the National Institute of Environmental  
4 Health Sciences voted four to three to recommend  
5 listing MTBE in the report as reasonably  
6 anticipated to be a human carcinogen. The Tribunal  
7 may find this document in the record at 25 JS tab  
8 19 at 3123.

9           Thus, contrary to Methanex's assertions  
10 yesterday that there is no credible evidence that  
11 MTBE has adverse health effects, recognized experts  
12 in the field are divided as to whether MTBE may be  
13 carcinogenic. In any event, there is no  
14 requirement that a state deem a chemical to be  
15 carcinogenic or even toxic before banning it. To  
16 the contrary, California has every right to protect  
17 itself by regulating chemicals that render water  
18 undrinkable, even assuming their presence in water  
19 do not result in other adverse health effects.

20           In short, Methanex's contentions on  
21 toxicity are wrong, but they are also beside the

1 point. California's basis for the ban of MTBE was  
2 its capacity to render water unpotable.

3 That concludes my presentation, and I  
4 would now like to turn the floor over to  
5 Ms. Menaker, who will address Methanex's assertion  
6 that the purpose of the MTBE ban was to benefit  
7 ethanol.

8 PRESIDENT VEEDER: Thank you very much  
9 indeed. Ms. Menaker.

10 MS. MENAKER: Thank you.

11 Mr. President, members of the Tribunal, I  
12 will now address the final portion of the United  
13 States's arguments Article 1101.

14 My colleagues have already demonstrated  
15 that California did not intend to harm Methanex or  
16 methanol producers when it banned MTBE in gasoline.

17 I will now show that California did not intend to  
18 benefit ethanol producers when it adopted the ban.

19 As we have shown, it would be legally  
20 irrelevant even if California did have this  
21 purported intent. Methanex and ethanol and ethanol

1 do not compete with each other in the gasoline  
2 oxygenate market. Therefore, even if California  
3 had intended to benefit ethanol producers, this  
4 Tribunal could not draw the inference that it  
5 intended to harm methanol producers like Methanex.

6           In any event, Methanex's assertion is  
7 baseless. California did not enact the ban in  
8 order to benefit ethanol producers. To the  
9 contrary, the inference that Methanex asks you to  
10 draw is belied by the undisputed facts in the  
11 record.

12           I will first show how California's own  
13 actions are inconsistent with an intent to benefit  
14 ethanol. I will then address Methanex's suggestion  
15 that this Tribunal should infer such an intent  
16 based on the fact that Governor Davis attended a  
17 dinner with certain persons involved in the ethanol  
18 industry and accepted campaign donations from ADM.  
19 I will demonstrate that such an inference is  
20 unwarranted. The purpose of the 1989 Executive  
21 Order is clear on its face. I have placed the

1 pertinent language with which you are undoubtedly  
2 very familiar by now on the screen, and this is  
3 also slide one in the packet you have received.

4           The Executive Order states that the  
5 Governor's decision was based on his determination  
6 that, and I quote, MTBE poses an environmental  
7 threat to groundwater and drinking water, end  
8 quote.

9           Yesterday, Methanex argued that, and I  
10 quote, It is the tendency of governments to use  
11 environmental regulations as a pretense to dress up  
12 what are actually other reasons for doing it, end  
13 quote.

14           Methanex may have indicated one or two  
15 examples where a Tribunal found that that was the  
16 case. There is, however, no presumption that  
17 governments tend to adopt pretextual regulations.  
18 Methanex has it precisely backwards. The  
19 presumption is that measures are not pretextual.

20           The Tribunal in its First Partial Award  
21 recognized this when it stated that governmental



1 acts are entitled to a presumption of regularity.  
2 The statement of purpose in the 1999 Executive  
3 Order, along with the rest of the Executive Order,  
4 therefore, is entitled to a presumption of  
5 regularity. Methanex has offered no evidence to  
6 overcome that presumption.

7           Methanex's argument that California's true  
8 intent was to benefit ethanol finds no support in  
9 the record. Contrary to Methanex's argument,  
10 California did not rush to embrace ethanol. In  
11 fact, rather than accept that ethanol would replace  
12 MTBE in California gasoline, the Executive Order,  
13 in accordance with the recommendation made in the  
14 UC report, announced that California would seek a  
15 waiver from the Federal oxygenate requirement.

16           I have placed the pertinent language from  
17 the Executive Order on the screen, and that is also  
18 slide two in your packet.

19           If granted, the use of ethanol in  
20 California gasoline would substantially decrease.  
21 The waiver request is inconsistent with any effort

1 to increase the use of ethanol in California. This  
2 provision of the Executive Order demonstrates that  
3 benefiting ethanol producers was not California's  
4 intent in banning MTBE.

5 California has vigorously pursued this  
6 waiver. Governor Davis wrote letters to the  
7 Administrator of the United States Environmental  
8 Protection Agency and to the President of the  
9 United States urging that California's request be  
10 granted.

11 When California's request was denied,  
12 California filed suit against the U.S. EPA in  
13 Federal Court. California's request is now under  
14 consideration once again and is being pursued by  
15 California with continued vigor.

16 Methanex has argued that even if the  
17 waiver were granted, California gasoline would  
18 likely still contain some ethanol. There is no  
19 question, however, that a far smaller amount of  
20 ethanol will be used than if the waiver were not  
21 granted. That is why, as Methanex itself concedes,

1 and I quote from its Second Amended Statement of  
2 Claim at paragraph 131, the U.S. ethanol industry  
3 bitterly opposed the waiver, end quote.

4           If California's intent was to provide a  
5 gift to the ethanol industry, it would not have  
6 sought this waiver. And if California's intent was  
7 to provide a gift to the ethanol industry, it would  
8 not have continued to pursue this waiver after it  
9 was initially denied. California's actions are  
10 fundamentally at odds with Methanex's proposition  
11 that California was motivated by an intent to  
12 benefit ethanol producers.

13           California has done more than just seek a  
14 waiver from the Federal oxygenate requirement. In  
15 March of 2002, Governor Davis issued an Executive  
16 Order directing the Air Resources Board to adopt  
17 regulations postponing the ban on MTBE for one  
18 year.

19           The Governor issued this order after the  
20 United States Environmental Protection Agency had  
21 initially denied California's waiver request. If

1 the ban were to have gone into effect as planned,  
2 ethanol would have had to have been added to almost  
3 all gasoline sold in California in order to comply  
4 with the Federal regulations.

5           The Governor determined that mandating  
6 such a large increase in ethanol supply in such a  
7 short period of time would cause substantial price  
8 increases, severe shortages in gasoline, and  
9 economic havoc.

10           As you can see on the slide that I have  
11 placed on the screen, in his press release  
12 announcing the postponement, the Governor explained  
13 his decisions as follows: He said, and I quote, I  
14 am not going to allow Californians to be held  
15 hostage by another out-of-state energy cartel, end  
16 quote.

17           He was referring, of course, to the  
18 ethanol industry. This statement dispels any  
19 notion that Governor Davis was motivated by an  
20 intent to benefit the ethanol industry.

21           Now surprisingly, ethanol proponents

1 soundly criticized the Governor's action postponing  
2 the ban. The Renewable Fuels Association is a  
3 nation trade association for the ethanol industry.  
4 It issued a press release denouncing the decision.  
5 The RFA accused Governor Davis of making, quote, a  
6 horrible decision for California, end quote.

7           It characterized the postponement as--and  
8 again, I have placed this quote on the screen and  
9 also in your package--a callous breach of faith  
10 with California consumers that want MTBE out of  
11 their drinking water now. Gasoline refiners and  
12 marketers that have invested to meet the original  
13 deadline, and farmers across the country that have  
14 added more than a billion gallons of ethanol  
15 capacity to enable the timely transition away from  
16 MTBE.

17           In fact, according to documents submitted  
18 by Methanex, the Governor's action postponing the  
19 MTBE ban resulted in an oversupply of ethanol that  
20 consequently dragged down ethanol prices to  
21 historic lows. While the ethanol industry

1 criticized the Governor's actions, the MTBE  
2 industry, on the other hand, had lobbied for the  
3 postponement and applauded the Governor's move.

4           Today, the MTBE ban is in effect in  
5 California, and there is an adequate supply of  
6 ethanol, and, yet, California is still seeking the  
7 waiver. Methanex's proposition that Governor Davis  
8 requested the waiver for political expediency is  
9 not borne out by the undisputed facts in the  
10 record.

11           Thus, contrary to Methanex's contention,  
12 California did not rush to embrace ethanol. Before  
13 accepting that ethanol would be accepted for use in  
14 even larger amounts of California gasoline, the  
15 1999 Executive Order directed the California Air  
16 Resources Board, the State Water Resources Control  
17 Board, and the Office of Environmental Health  
18 Hazard Assessment to conduct studies on ethanol.  
19 Those studies were peer-reviewed and presented to  
20 the California Environmental Policy Council at the  
21 end of 1999, before the regulation banning MTBE

1 went into effect. After public hearings, the  
2 California Environmental Policy Council unanimously  
3 approved of the report and passed a resolution. I  
4 have placed language from that resolution on the  
5 screen.

6           That resolution stated, and I quote, There  
7 will not be a significant adverse environmental  
8 impact on public health or the environment  
9 including any impact on air, water, or soil that is  
10 likely to result from the change in gasoline that  
11 is expected to be implemented to meet the  
12 California RFG3 regulations approved by the ARB,  
13 end quote.

14           Nor were the amendments made to the Phase  
15 III California reformulated gasoline regulations  
16 that Methanex mentioned yesterday intended to  
17 benefit ethanol. Mr. Dean Simeroth, who, as my  
18 colleague, Mr. David Pawlak, mentioned, will be  
19 testifying on Friday, and who is the Chief of the  
20 Criteria Pollutants Branch of the California Air  
21 Resources Board for the California Environmental

1 Protection Agency, explained in his first witness  
2 statement that those amendments were intended to  
3 provide refiners with maximum flexibility in  
4 producing gasoline while subjecting that gasoline  
5 to the same stringent emission requirements which  
6 ensures that air quality benefits are maintained.  
7 Mr. Simeroth's testimony refutes any alleged intent  
8 on behalf of California to benefit ethanol  
9 producers.

10           What does Methanex ask this panel to rely  
11 on to reach a conclusion at odds with all of this  
12 evidence and assume that California intended to  
13 benefit ethanol producers? Two events. One is a  
14 dinner that occurred in August 1998, and the other  
15 is ADM's campaign contributions to Governor Davis's  
16 election campaign. From these two quite ordinary  
17 events, Methanex asks the Tribunal to draw the  
18 following extraordinary inferences: First, that as  
19 a result of certain remarks made at the dinner,  
20 Governor Davis was persuaded to ban MTBE in order  
21 to benefit ethanol producers. And second, that in



1 exchange for campaign contributions from ADM,  
2 Governor Davis signed the Executive Order. There  
3 is no basis to support such speculation.

4 I will first discuss the dinner and then  
5 the campaign contributions.

6 My colleague, Mr. Legum, has already  
7 discussed the August dinner and shown how it  
8 provides no evidence to support Methanex's claim  
9 that California's ban was intended to harm Methanex  
10 or methanol producers. I will now discuss that  
11 dinner again in light of Methanex's claim that the  
12 dinner is evidence that Governor Davis intended to  
13 benefit ethanol producers.

14 Methanex attempts to cast the August 1998  
15 dinner in a sinister light by repeatedly referring  
16 to it as the secret meeting. There was, however,  
17 nothing secret about it. Yesterday Methanex  
18 focused on the campaign form that I have placed on  
19 the screen. As the Tribunal can see, this form is  
20 a disclosure form for campaign expenditures. When  
21 candidates spend funds that they have raised for

1 their campaigns, they have an obligation to  
2 disclose how they are spending those funds. The  
3 public can then confirm that campaign donations are  
4 indeed being spent for campaign-related purposes  
5 and not for private purposes. That is what this  
6 form is. It discloses that Governor Davis used  
7 some of his campaign funds to purchase an airplane  
8 ticket to attend a meeting in Chicago to meet with  
9 labor representatives.

10 PRESIDENT VEEDER: Before you move on, do  
11 we know what the code name "T" means in the middle  
12 column? It's my way of saying I don't know, but I  
13 wondered whether you do.

14 MS. MENAKER: I don't know offhand,  
15 although I can attempt to find out.

16 PRESIDENT VEEDER: Thank you very much.  
17 My colleague says it may mean "T" for travel.

18 MS. MENAKER: That would be, I think, a  
19 very good guess.

20 Methanex argued that while Governor Davis  
21 disclosed his trip to Chicago to meet with labor

1 leaders, he did not disclose his trip to Decatur,  
2 Illinois. This is simply untrue.

3 I have placed on the screen another slide.  
4 Because this image was taken from a PDF image, it  
5 may be difficult to read, although certainly the  
6 one in your JS files is clear. This is a form for  
7 reporting campaign donations received by the  
8 candidate. Both monetary and in-kind donations  
9 must be disclosed. In accordance with that law,  
10 Governor Davis reported that he flew on ADM's  
11 private plane, free of cost, from Chicago to ADM's  
12 headquarters in Decatur, Illinois, on the evening  
13 of the dinner. That is public information, and as  
14 the Tribunal correctly noted yesterday, there is  
15 absolutely no evidence that ADM denied meeting with  
16 Governor Davis, nor is there any evidence that  
17 anybody else denied the fact that the meeting had  
18 occurred. There was nothing secret about this  
19 dinner.

20 PRESIDENT VEEDER: Just pausing there, is  
21 it right to go as far as you go? If you look at

1 the entry for Archer Daniels Midland and the  
2 Decatur address, that relates to the full name and  
3 address of the contributor. Where would you get  
4 from this entry that this covered a flight from  
5 Chicago to Decatur?

6 MS. MENAKER: Well, it took place on the  
7 same day, it's on August 4, 1998, which is the same  
8 day he was in Chicago, where he put in his expense  
9 form for the meeting that he flew to, to attend  
10 with labor representatives.

11 PRESIDENT VEEDER: You say reading them  
12 together you'd be able to work out that he hadn't  
13 taken a private plane to Chicago, he'd taken a  
14 United Airways flight, and therefore, he must have  
15 used the flight to go from Chicago to somewhere  
16 else?

17 MS. MENAKER: Well, he would not--if he  
18 had not taken a United Airlines flight or a public  
19 carrier, he would not have had to have disclosed it  
20 on his expenditures form, which is what he did for  
21 the Chicago meeting. On this, this form indicates

1 that he received something by a contributor, and  
2 what he received here was the use of a plane. So I  
3 think that is a fair inference to draw, that he was  
4 using ADM's private plane on the same day where he  
5 was scheduled to be in Chicago, but nevertheless,  
6 there is no requirement that candidates disclose  
7 meetings that they hold with potential supporters.  
8 All they need to disclose is contributions that  
9 they receive, whether those contributions be  
10 monetary contributions or in-kind contributions.  
11 And here, the value that ADM gave him was the use  
12 of the plane, which its fair market value was  
13 considered to be \$2,400, which is why he needed to  
14 make that disclosure, and I certainly think there  
15 is nothing surprising about the fact that if he is  
16 in Chicago, and ADM's headquarters are in Decatur,  
17 and he is using that private plane, that he  
18 traveled to Decatur on their private plane.

19           This was nothing more than a routine  
20 dinner attended by a candidate with potential  
21 supporters. As I said, Governor Davis was in

1 Chicago meeting with labor union representatives on  
2 the date the dinner occurred. After his meetings  
3 in Chicago, he flew to Decatur.

4           This was just one of innumerable meals  
5 that the Governor attended while campaigning.  
6 Press conferences are not held announcing events  
7 like these, and no inference of wrongdoing can be  
8 made on the basis that they occurred. Nor does the  
9 discussion, the content of the discussion at that  
10 dinner support the inferences that Methanex seeks  
11 to draw.

12           First, no evidence supports the inference  
13 that the focus of the dinner discussion was the  
14 MTBE problem, and that the Governor's decision was  
15 influenced by anything said at that dinner. All of  
16 the evidence in the record supports the opposite  
17 conclusion. We have in the record the witness  
18 statements of three persons who attended that  
19 dinner. First, there is the witness statement of  
20 Roger Listenberger, who was an ADM employee and who  
21 will be cross-examined on Thursday.

1 Mr. Listenberger stated that ADM discussed its  
2 presence in California, and that ADM's ethanol  
3 business was only briefly discussed.

4 Mr. Listenberger testified that neither methanol  
5 nor Methanex was discussed, and he recalled the  
6 issue of MTBE arising only once, when he asked the  
7 Governor whether he thought the issue might arise  
8 in his campaign. Mr. Listenberger testified that  
9 the Governor said no.

10           Second, Richard Vind, who was with Regent  
11 International, an ethanol company, and who will  
12 also be cross-examined on Thursday, also submitted  
13 a witness statement. Mr. Vind testified that the  
14 dinner conversation focused on Governor Davis's  
15 campaign. He recalled that ADM's business was  
16 discussed, but that neither methanol nor Methanex  
17 was discussed. He had no recollection of MTBE  
18 having been discussed.

19           Finally, Daniel Weinstein, who will also  
20 be cross-examined on Thursday, submitted a witness  
21 statement. Mr. Weinstein is with Weatherly Capital

1 Investments Group. He similarly recollected that  
2 the conversation at dinner was a general one. He  
3 recalled that ADM representatives talked about  
4 their company and their business in California. He  
5 did not recall any discussion of methanol,  
6 Methanex, or MTBE.

7           Methanex has introduced no evidence to  
8 call into doubt this testimony. It nevertheless  
9 asks you to draw an inference at odds with this  
10 evidence. According to Methanex, you should assume  
11 that the conversation at dinner focused on ethanol  
12 and how the Governor could support ethanol because  
13 a majority of the attendees at dinner were involved  
14 in the ethanol industry. This inference is not  
15 only contrary to all of the evidence in the record,  
16 it is based on an erroneous assumption.

17           In his statement, Mr. Vind identifies the  
18 persons who he recalled being at the dinner. From  
19 the list of attendees, it is apparent that despite  
20 Methanex's repeated allegations, the majority of  
21 the attendees were not primarily responsible for



1 ethanol-related matters. Mr. Vind, of course,  
2 himself was involved in the ethanol industry at the  
3 time.

4           As far as the ADM attendees were  
5 concerned, however, only one attendee, Mr. Roger  
6 Listenberger, could be described as someone whose  
7 job focused on ethanol. The other attendees from  
8 ADM were all senior officers whose responsibilities  
9 spanned a wide range of ADM's business. These  
10 people included ADM's Chief Executive Officer and  
11 an ADM Senior Vice President.

12           In addition, the other attendee mentioned  
13 by Mr. Vind, and that is Mr. Daniel Weinstein, has  
14 no connection with the ethanol industry. At the  
15 end of the day, that makes two persons, only one of  
16 whom is from ADM, out of a total of six attendees  
17 who could be said to be primarily in the ethanol  
18 business. That is not by any count a majority of  
19 participants.

20           It is not at all unreasonable that the  
21 senior ADM executives who are responsible for many

1 aspects of ADM's business would speak generally  
2 about ADM's business, and particularly about ADM's  
3 presence in California when meeting with a  
4 candidate for Governor of California. That accords  
5 with the evidence in the record and is entirely  
6 reasonable.

7           In any event, even if the dinner  
8 conversation had focused on ethanol, or even if  
9 MTBE, methanol, or Methanex had been discussed,  
10 that would in no way establish the illicit intent  
11 asserted. There is no requirement that politicians  
12 be hermetically sealed off from the public. To the  
13 contrary, politicians routinely interact with  
14 members of the public and listen to what the public  
15 has to say.

16           In fact, the record contains evidence that  
17 just days before the Governor signed the Executive  
18 Order, one of the Governor's top aides went on a  
19 tour of Arco's refinery in California. Arco's  
20 Chief Executive Officer also phoned the Governor to  
21 defend the use of MTBE in California gasoline.

1 When asked to explain Arco's behavior, its lobbying  
2 and public affairs manager was quoted as saying,  
3 and I quote, The most important thing is we want to  
4 be able to discuss these issues and get our views  
5 on the table, end quote.

6           We all know that politicians are likely to  
7 be exposed to various viewpoints. Arco's  
8 interaction with the Governor's office demonstrates  
9 this reality. The mere fact that an interested  
10 party has expressed its views to a politician does  
11 not give rise to any inference of impermissible  
12 conduct.

13           I will now examine Methanex's hypothesis  
14 that ADM contributed to Governor Davis's campaign  
15 with the expectation that the Governor would take  
16 action to benefit ethanol producers and that in  
17 exchange for these campaign contributions, the  
18 Governor directed that MTBE be banned from  
19 California gasoline.

20           Of course, if Governor Davis had signed  
21 the Executive Order explicitly or implicitly in

1 exchange for ADM's campaign contributions, that  
2 would constitute a crime under U.S. law. Methanex  
3 does not dispute this. Yet, Methanex has  
4 repeatedly disavowed any claim that Governor Davis  
5 committed a crime.

6           Herein lies an insurmountable  
7 contradiction in Methanex's case. It is asking  
8 this Tribunal to draw an inference that it can only  
9 draw if it assumes facts that Methanex has conceded  
10 are not existent. By conceding that Governor Davis  
11 did nothing illegal, Methanex has conceded that the  
12 Governor did not take any action in exchange for  
13 donations or the promise of donations. If Governor  
14 Davis was not influenced to sign the Executive  
15 Order because of ADM's campaign contributions,  
16 those contributions are completely irrelevant, and  
17 indeed, that is the case. Even if Methanex were to  
18 back away from its earlier concession, however,  
19 there is no evidence in the record to support an  
20 inference that Governor Davis was improperly  
21 influenced by campaign contributions made by ADM.

1           Methanex has relied principally on a  
2 recent U.S. Supreme Court case, *McConnell versus*  
3 *Federal Elections Commission*, to support the  
4 inference it asks you to draw, and Methanex's  
5 reliance is misplaced. As we explained in our  
6 rejoinder, there are laws in the United States  
7 regulating political contributions. The  
8 legislative history of those laws show that  
9 Congress found that political contributions created  
10 a sufficient danger of corruption, as well as an  
11 appearance of corruption, that regulation of such  
12 contributions was justified.

13           The Supreme Court upheld the regulation at  
14 issue in the *McConnell* case, finding that they did  
15 not run afoul of U.S. constitutional protections  
16 for free speech. Congress did not determine that  
17 all campaign contributions were corrupting. It did  
18 not outlaw all such campaign contributions. That  
19 the possibility or appearance of corruption  
20 justified regulation does not and cannot support a  
21 finding that by virtue of making or receiving a

1 lawful contribution there is corruption.

2           Let me provide an analogy. Like campaign  
3 finance, the field of securities is also highly  
4 regulated in the United States. It would however,  
5 be unreasonable to suggest that the mere fact that  
6 the securities field is highly regulated is cause  
7 for inferring wrongdoing with respect to any  
8 particular sale of securities, especially where  
9 there is agreement that all such regulations were  
10 respected in relation to that sale. And that is  
11 the case here. It is uncontested that the ADM  
12 contributions in question complied with all  
13 applicable U.S. laws.

14           Assume for the moment that Methanex's  
15 premise were accepted. Under Methanex's theory, if  
16 Governor Davis had reached a different  
17 determination in the Executive Order, this Tribunal  
18 would be justified and, in fact, compelled to find  
19 that the Governor was improperly influenced by  
20 Arco. After all, the record contains evidence  
21 showing that Arco contributed approximately the

1 same amount as did Methanex to the Governor Davis's  
2 gubernatorial campaign.

3           Excuse me, I'm sorry. The record contains  
4 evidence--let me correct that--the record contains  
5 evidence showing that Arco contributed  
6 approximately the same amount as did Methanex--as  
7 did ADM, excuse me, to Governor Davis's campaign.

8           Arco's CEO apparently called the Governor  
9 just days before the Governor signed the Executive  
10 Order to defend the use of MTBE, and one of the  
11 governor's top aides took a tour of Arco's refinery  
12 days before the Executive Order was signed. Under  
13 Methanex's theory, this would mean that the  
14 Governor had been improperly influenced by Arco.  
15 Of course, such an inference would be unwarranted.  
16 Equally unwarranted is the inference that Methanex  
17 asks you to draw regarding ADM's influence over  
18 Governor Davis.

19           The only so-called evidence of corruption  
20 on Governor Davis's part that Methanex has  
21 submitted are newspaper articles. All but one of

1 these articles are opinion pieces. No  
2 international Tribunal nor competent domestic  
3 court, for that matter, would or could base an  
4 inference of wrongdoing solely on reports in  
5 newspapers without any documentary evidence or  
6 witnesses to corroborate any of the allegations  
7 that might have been repeated in those reports.

8 All of the remaining evidence proffered by  
9 Methanex relates not to Governor Davis, but to the  
10 ethanol industry. This evidence is irrelevant.  
11 Neither ADM, Regent, Richard Vind, nor the ethanol  
12 industry in general is on trial here. Nor can the  
13 United States be held responsible for ADM's,  
14 Regent's, or Richard Vind's conduct.

15 In any event, Methanex's own arguments  
16 only confirm California's good faith. Yesterday  
17 Methanex repeated arguments previously made in  
18 Mr. Wright's supplemental affidavit. Methanex  
19 claimed that the ethanol industry was, and I quote,  
20 involved with the manipulation of the public  
21 opinion and the whipping up of the degree of



1 concern about MTBE that simply wasn't merited by  
2 the facts, end quote. The fact that public opinion  
3 supported the ban only confirms California's good  
4 faith. As the United States noted in its Amended  
5 Statement of Defense, it is legitimate and  
6 unremarkable that elected officials take action in  
7 response to public opinion. If the public believed  
8 that its drinking water was endangered because of  
9 MTBE contamination, and the Governor acted in  
10 response to those concerns, that dispels any  
11 illicit intent on Governor Davis's part.

12           Finally, even assuming for the sake of  
13 argument that ADM did intend to improperly  
14 influence Governor Davis, and there is no such  
15 evidence here, that cannot bear on Governor Davis's  
16 motivation absent evidence that, as I have just  
17 demonstrated, is wholly lacking here. It is ironic  
18 that Methanex's claim centers on the lobbying  
19 activities and campaign contributions made by  
20 Regent and ADM. Methanex does not deny that it too  
21 engages in lobbying. After all, it was Methanex's

1 lobbyists who were purportedly at the meeting with  
2 Senator Burton on which Methanex relies.

3           Yesterday, Methanex also conceded that  
4 after the UC report was issued, the methanol lobby,  
5 and I quote, launched a vigorous lobbying campaign  
6 to try to convince Governor Davis that the report  
7 was wrong and that the ban on MTBE was the wrong  
8 solution, end quote.

9           Methanol (sic) has issued memoranda  
10 showing that its lobbyists held over 20 meetings  
11 with California legislators, and it bears noting  
12 that there is no indication that Methanex or the  
13 methanol lobby or anyone else felt it was necessary  
14 to publicly announce that those meetings were held.  
15 Those meetings are no more or less secret than the  
16 meeting ADM held with Governor Davis, and in  
17 addition to its lobbying activities, the evidence  
18 shows that Methanex has also made donations to U.S.  
19 political parties. Yet--

20           PRESIDENT VEEDER: I thought it was an  
21 offer to make? Did they actually make them? I

1 thought they had to repay the money?

2 MS. MENAKER: There is--they did have to  
3 repay one of the contributions that was listed in  
4 the article, but nevertheless they did make the  
5 contribution. It was later deemed to be an illegal  
6 contribution and was returned to them.

7 Yet, while attacking ADM's and Regent  
8 International's legitimate activities and accusing  
9 ADM of spying on its competitors, Methanex, at  
10 best, hired individuals to sift through the garbage  
11 dumpster behind Mr. Vind's office and salvage his  
12 personal files, and it appears this was not done in  
13 connection with any litigation, but rather was a  
14 systemic effort to dig up dirt for use for  
15 political advantage. I understand that the  
16 Tribunal is going to schedule argument on whether  
17 these documents should be excluded from evidence,  
18 so I will defer making those arguments until that  
19 time. I pause here only to note the tension  
20 between Methanex's attacks on the U.S. political  
21 system and the ethanol lobby's legitimate

1 activities and its own behavior.

2           Finally, it's important to keep in mind  
3 that almost all of Methanex's allegations relate  
4 solely to influence that ADM or the ethanol lobby  
5 supposedly had over Governor Davis. As  
6 Mr. Clodfelter noted this morning in his  
7 presentation of the facts, Governor Davis did not  
8 have a lot of discretion insofar as the MTBE ban  
9 was concerned. Senate Bill 521 had been  
10 unanimously passed by the California Legislature  
11 and signed by the previous Governor in office.  
12 That bill required the Governor to make one of two  
13 determinations. Once again I have put this  
14 language on the screen for you to look at. He  
15 could decide, one, that on balance, there is no  
16 significant risk to human health or the environment  
17 of using MTBE and gasoline in the state, or, two,  
18 that on balance, there is a significant risk to  
19 human health or the environment of using MTBE in  
20 gasoline in the state.

21           The bill required the Governor to make

1 this determination within ten days after the  
2 completion of public hearings on the UC report.  
3 Senate Bill 521, as you've heard, also required  
4 that the Governor's determination be based on the  
5 UC report, its assessment, and the public hearings.  
6 You've just heard my colleague, Mr. Pawlak,  
7 describe the recommendations of the UC report, as  
8 well as the peer-reviewed comments and some of the  
9 testimony that was offered at the public hearings.  
10 It is undisputed that the UC report concluded that  
11 there was a significant risk to human health or the  
12 environment from using MTBE. Taking this  
13 information into account, what would have been  
14 surprising would have been if the Governor had come  
15 to an opposite conclusion, at odds with the  
16 recommendation proposed by the UC report.

17 Governor Davis's subsequent actions also  
18 conformed with the expectations in Senate Bill 521  
19 and the recommendations in the U.S. report.  
20 Methanex argued yesterday that even if the Governor  
21 was justified in making his determination, his

1 action banning MTBE was somehow unjustified. But  
2 again, the facts are the contrary. Senate Bill 521  
3 directed the Governor to take appropriate action to  
4 protect public health and the environment to the  
5 extent he made the determination that MTBE did pose  
6 a significant risk.

7           Immediately following Section 3, which  
8 directs the Governor to take appropriate action,  
9 the next two provisions evidence that the only  
10 action envisioned by the Legislature that had  
11 unanimously passed Senate Bill 521 was banning  
12 MTBE. Those provisions state that if the sale and  
13 use of MTBE in gasoline is discontinued pursuant to  
14 subdivision (f), then the State shall not  
15 thereafter adopt or implement any rule or  
16 regulation that permits or requires the use of MTBE  
17 in gasoline. The following provision similarly  
18 states that if the sale and use of MTBE is to be  
19 discontinued pursuant to subdivision (f), then the  
20 Air Resources Board shall notify the Environmental  
21 Protection Agency that MTBE will be discontinued in

1 the state.

2           In addition, the UC report concluded the  
3 follow, and I've also placed the language on the  
4 screen, quote, We recommend consideration of  
5 phasing out MTBE over an interval of several years,  
6 end quote.

7           As you can see, insofar as his  
8 determination was concerned, the Governor's  
9 discretion was quite limited. He was required to  
10 take action based on the UC report, its assessment,  
11 and the public hearings. The determination he made  
12 was consistent with the UC report's recommendation.  
13 The action he took in response also accorded with  
14 the expectations set forth in Senate Bill 521, as  
15 well as with the recommendation of the UC report.  
16 For this reason alone, the emphasis that Methanex  
17 places on ADM's supposed influence over Governor  
18 Davis is misplaced.

19           In conclusion, there is no evidence that  
20 even suggests, never mind proves, that Governor  
21 Davis intended to benefit the ethanol industry when

1 he made his determination that MTBE posed a risk to  
2 California's drinking water. The Governor's  
3 actions in seeking a waiver of the oxygenate  
4 requirement and postponing the effective date of  
5 the ban belie any supposed intent to benefit the  
6 ethanol industry. Those actions were taken at the  
7 same time by the same individual in relation to the  
8 same problem and were harshly criticized by ethanol  
9 proponents. In light of this evidence, and the  
10 absence of any other evidence, it is not plausible  
11 to conclude that the Governor intended to benefit  
12 the ethanol industry.

13           Unless the Tribunal has any questions, I  
14 would ask to turn the floor over to Mr. Bettauer.

15           PRESIDENT VEEDER: Just before we take a  
16 break, Ms. Menaker, there is one thing we would  
17 like to raise, and if you want to come back to this  
18 question later, please do. But Governor Davis is  
19 no longer an officer in the government of  
20 California, he is a private citizen, and some very  
21 harsh things are being said about him in these



1 proceedings to which he is not a party, and where  
2 he is not legally represented. We understand that  
3 he is not a witness being called by the United  
4 States Government, but has he been approached or  
5 advised that there is an opportunity for him to  
6 give evidence if he were to be called by the United  
7 States?

8 MS. MENAKER: If I may take a moment?

9 (Pause.)

10 MS. MENAKER: I can tell you that when the  
11 Governor was Governor, we had spoken to the  
12 Governor's office, not to the Governor personally,  
13 but to individuals who worked in his office, and he  
14 was not interested in participating. Since he has  
15 left the governorship, we have not contacted him.

16 PRESIDENT VEEDER: Let's take a ten-minute  
17 break, and then we will come back here at quarter  
18 past four. But before that, we'll hear Mr. Legum.

19 MR. LEGUM: Would it be convenient for  
20 Mr. Bettauer to give a short, a very short  
21 conclusion--I retract that. Thank you.

1           PRESIDENT VEEDER: Having retracted that,  
2 we will have a ten-minute break and come back at  
3 quarter past four. Thank you very much.

4           (Brief recess.)

5           PRESIDENT VEEDER: Let's proceed.

6           MR. BETTAUER: Thank you, Mr. President  
7 and members of the Tribunal.

8           I would like to briefly pull together a  
9 few of the key points that have been made in the  
10 last three presentations dealing with Article 1101.

11           First, you have seen that there is very  
12 little evidence before the Tribunal concerning  
13 methanol as opposed to ethanol and MTBE. None of  
14 the evidence supports Methanex's assertion that  
15 California intended to harm methanol producers by  
16 banning MTBE. As Mr. Legum demonstrated, this  
17 failure of proof by itself is fatal to all of  
18 Methanex's claims.

19           Second, methanol and ethanol do not  
20 compete with each other, in any sense, relevant for  
21 the purposes of any ban of MTBE in California

1 gasoline. Methanol is, as this Tribunal observed  
2 in the First Partial Award, a feedstock for MTBE.  
3 Ethanol is a gasoline additive that directly  
4 competes with MTBE. Methanol, unlike MTBE or  
5 ethanol, cannot be added to gasoline to meet the  
6 oxygenate requirements of the Clean Air Act. Under  
7 the reasoning of the First Partial Award, and on  
8 the evidence in this case, there is no relevant  
9 competition between methanol and ethanol, period.

10           Third, Mr. Pawlak demonstrated that the  
11 science on which the MTBE ban was based is, at  
12 best, of tangential relevance to this case. There  
13 is no dispute that the conclusions of the UC report  
14 supported Governor Davis's finding, that MTBE posed  
15 a significant threat to the state's drinking water  
16 resources. The only way in which the science could  
17 be relevant here is that if Methanex had  
18 established that the science was a sham or a  
19 pretext, and that the decision makers in fact knew  
20 this. But the record does not remotely show any  
21 such thing.

1           Fourth, Ms. Menaker showed that the record  
2 does not support Methanex's assertion that  
3 California intended to provide a gift to the  
4 ethanol industry by banning MTBE. To the contrary,  
5 the record shows that California took numerous  
6 actions that were detrimental to ethanol interests,  
7 including seeking a waiver of the oxygenate  
8 requirement from the U.S. EPA, and postponing the  
9 ban by one year. The evidence Methanex relies on,  
10 the August 1998 dinner and campaign contributions,  
11 do not show what Methanex says they show. Again,  
12 the record establishes that the purpose of the ban  
13 was exactly what California said it was, to protect  
14 California's groundwater resources from a  
15 contaminant that made water undrinkable.

16           In sum, the record simply does not sustain  
17 Methanex's allegation that the MTBE ban was  
18 intended to hurt foreign methanol and benefit  
19 domestic ethanol. The measures did not relate to  
20 Methanex or its investments. Methanex's claims do  
21 not fall within the scope of Chapter 11, and they

1 do not fall within the scope of the U.S. consent to  
2 arbitrate set forth in that Chapter. It is clear  
3 there is no jurisdiction over this case.

4           We now turn to a different reason why all  
5 of Methanex's claims should be dismissed. Methanex  
6 has not demonstrated that it suffered any loss  
7 proximately caused by the measure at issue. Again,  
8 we will divide our presentation on this subject,  
9 this time into two parts. First, Mr. Legum will  
10 focus on the chain of causation in this case. He  
11 will show that any effect on Methanex from the  
12 measures at issue, if there was any effect at all,  
13 is too remote to give rise to a recognizable claim.

14           Any impact on Methanex could only occur as  
15 the result of the measures' effects on Methanex's  
16 contractual counterparties under settled  
17 international law, incorporated into the NAFTA.  
18 This kind of remote effect through third parties  
19 does not establish loss that can sustain a NAFTA  
20 claim.

21           Second, Mr. McNeil will discuss the

1   allegations of loss that Methanex makes. He will  
2   demonstrate that Methanex has failed to establish  
3   any loss or damage at all within the meaning of  
4   Articles 1116 or 1117 of the NAFTA. This lack of  
5   evidence of any loss or damage is fatal to all of  
6   Methanex's claims.

7               Mr. President, I now ask you to call on  
8   Mr. Legum to begin our discussion of this part of  
9   our presentation.

10              PRESIDENT VEEDER: Thank you,  
11   Mr. Bettauer.

12              Mr. Legum.

13              MR. LEGUM: Thank you, Mr. President.

14              I will now address the chain of causation  
15   in this case. I will demonstrate that the loss  
16   alleged by Methanex is far too remote to be  
17   recognized under applicable principles of  
18   international law.

19              Methanex has at no point in the past four  
20   years disputed the nature of the causal chain in  
21   this case. The measure at issue regulates the sale

1 of California gasoline containing MTBE. There is  
2 no dispute--and I have a little graphic going on  
3 the screen there--there is no dispute that the  
4 first link in this causal chain is the impact of  
5 the measure on sellers of California gasoline, the  
6 persons who are directly regulated by the measure  
7 at issue.

8           Methanex's allegation is that these  
9 sellers will, as a result of the ban, buy less MTBE  
10 to use in the California gasoline that they  
11 produce. Methanex alleges, and this is the second  
12 link in the chain, that these decreased purchases  
13 will create an adverse impact on producers of MTBE,  
14 the second link, as I said before, in the causal  
15 chain.

16           According to Methanex, the producers of  
17 MTBE will manufacture less MTBE as a result of the  
18 ban, and therefore, need to buy less methanol to  
19 produce MTBE. This will, assuming that the supply  
20 of methanol remains constant, according to them,  
21 result in lower worldwide methanol prices. This is

1 the third link.

2           And finally, if worldwide methanol prices  
3 did in fact decrease, that would have an adverse  
4 impact on Methanex and its investments.

5           It is, therefore, apparent that the causal  
6 chain in this case depends upon the impact of the  
7 measures on suppliers, Methanex, to suppliers, MTBE  
8 producers, to the persons directly regulated by the  
9 ban, sellers of California gasoline. It is equally  
10 undisputed that under established principles of  
11 international law, a remote chain of causation  
12 cannot give rise to state responsibility. The  
13 United States collected numerous authorities to  
14 support this proposition. At pages 16 to 30 of its  
15 November 2000 memorial on jurisdiction and  
16 admissibility.

17           Methanex has at no point in the  
18 intervening four years, attempted to disprove the  
19 principle of proximate causation recognized by  
20 these international law authorities. If these  
21 authorities apply to this case, then Methanex's



1 claims must be dismissed in their entirety under  
2 the holding of these cases.

3           Now, while Methanex does not dispute the  
4 principle, it does dispute the application of the  
5 principle. It advances two arguments for the  
6 non-application of the principle of proximate  
7 causation. I will, with my remaining time today,  
8 show that each of these arguments is without merit.

9           Methanex's main argument for  
10 non-application of the principle is that NAFTA  
11 Articles 1116(1) and 1117(1) dispensed with the  
12 normal requirement of proximate cause by using the  
13 word "by reason of," and the words that Methanex  
14 highlights, "or arising out of a breach." The text  
15 of Article 1117(1) is on the screen. The text of  
16 Article 1116(1) is, for these purposes, identical.

17           Methanex concedes that the words "by  
18 reason of" signify proximate causation, but it  
19 argues based on municipal law cases in the  
20 insurance context that the words "arising out of"  
21 embody a different, more expansive approach to

1 causation, never before seen in international law.  
2 This argument is without substance for several  
3 reasons. First of all, it is international law,  
4 not municipal insurance law, that governs this  
5 case. Under international law, the phrase "arising  
6 out of," or similar formulations, have repeatedly  
7 been held to reflect a proximate cause standard.  
8 The United States demonstrated this at pages 9 to  
9 13 of its reply on jurisdiction three years ago.

10           The Algiers Accords provide one example.  
11 As the Iran-U.S. Claims Tribunal has repeatedly and  
12 unambiguously held, those accords use the words  
13 "arising out of" to signal proximate cause.

14           Another example is the Mexico-U.S. General  
15 Claims Convention of 1923, which use the words  
16 "originating from" to the same effect as the claims  
17 commission established by that treaty found.

18 Methanex has never offered a response to the United  
19 States showing concerning these accords. This is,  
20 we submit, because there is no response.

21           Now, Methanex does complain that under

1 this interpretation, "by reason of" means pretty  
2 much the same thing as "arising out of." This  
3 complaint, however, is without merit. Treaty  
4 negotiators, particularly in the context of  
5 negotiations among parties with different languages  
6 and different legal traditions, treaty negotiators  
7 often use equivalent phrases as "belts and  
8 suspenders" to ensure that the desired concept gets  
9 across. Articles 1116 and 1117 themselves provide  
10 another example of such an approach. We have the  
11 text on the screen in slide six. They use the  
12 words "loss" or "damage." Now, if there is a  
13 difference between "loss" or "damage"--loss and  
14 damage for purposes of this provision, it is too  
15 subtle for us to be able to perceive. "Loss" or  
16 "damage," both words are used there in order to  
17 signal in a clear way the same concept. There is  
18 nothing incongruous about the NAFTA parties' use of  
19 two equivalent expressions for proximate causation.  
20 My second point is if ever there were any  
21 doubt as to the NAFTA parties' intent to

1 incorporate the traditional standard of proximate  
2 causation by the clause "by reason of" or "arising  
3 out of," that doubt has been dispelled by the NAFTA  
4 parties' submissions to this Tribunal in this case.

5           As Mexico notes in its fourth  
6 submission--and we have the text on the screen  
7 now--Mexico has expressly agreed that those  
8 articles incorporate the standard of proximate  
9 causation. And Canada, as demonstrated in slide  
10 eight, has similarly stated its view that, quote,  
11 The ordinary meaning of the words "by reason of" or  
12 "arising out of," establishes that there must be a  
13 clear and direct nexus between the breach and the  
14 loss for damage incurred, close quote.

15           Under Article 31(3)(a) of the Vienna  
16 Convention on the Law of Treaties, or to be more  
17 precise, the rule of customary international law  
18 reflected in that provision, such a subsequent  
19 agreement on the interpretation of a treaty by its  
20 parties shall be taken into account.

21           Finally, the only other NAFTA Tribunal to

1 address the question to date also reads Article  
2 1116 and 1117 as reflecting a standard of proximate  
3 causation. Slide nine shows a quote from the  
4 Tribunal in the S.D. Myers versus Canada case which  
5 in its award on damages concluded that, quote, The  
6 breach of the specific NAFTA provision, must be the  
7 proximate cause of the harm.

8           In sum, nothing supports Methanex's  
9 assertion that NAFTA adopted a previously unknown  
10 standard of causation. The overwhelming weight of  
11 international claims authority, the unanimous views  
12 of the NAFTA parties, and the only other NAFTA  
13 Tribunal to address the question all agree.  
14 Articles 1116 and 1117 incorporate the familiar  
15 principle of proximate causation. That principle  
16 compels dismissal of Methanex's case.

17           Methanex's second argument for  
18 non-application of the principle of proximate  
19 causation in no way changes this result.  
20 Methanex's second argument is that its allegations  
21 that California acted intentionally change the

1 equation. This argument fails on several levels.

2           First, as we demonstrated in our  
3 presentation earlier today, the record in no way  
4 supports Methanex's allegations that California  
5 intended to harm or even address methanol producers  
6 by banning MTBE. Methanex has failed to prove the  
7 intent upon which this argument is premised.

8           Second, Methanex's own authority, the Dix  
9 case, suggests that intentional harm is relevant to  
10 the causation analysis only where it is directed  
11 both at the claimant and at the specific harm  
12 alleged. There is no evidence in the record  
13 showing that California had Methanex in mind when  
14 it adopted the ban, let alone that it specifically  
15 intended harm to Methanex's goodwill or any of the  
16 other losses alleged by Methanex. The lack of  
17 proof of specific intent further defeats this  
18 argument by Methanex.

19           Finally, even if Methanex could support  
20 its intent allegations, which it has not, and it  
21 cannot, that would not relieve it of the burden of

1 showing losses proximately caused by the breach. A  
2 showing that a tortfeasor specifically intends an  
3 indirect injury may allow a Tribunal to overlook  
4 the indirect nature of the injury, but such a  
5 showing in no way abolishes the rule that a loss  
6 caused by the breach must be shown.

7           The NAFTA itself confirms that a showing  
8 of loss caused by the breach is required. Slide  
9 ten shows again the text of Article 1117. It  
10 unequivocally requires a showing of, quote, loss or  
11 damage and requires that that be, "by reason of" or  
12 "arising out of" the breach. The text of the  
13 treaty in no way supports Methanex's suggestion  
14 that the universal requirement of proof of loss and  
15 causation is suspended when a claimant alleges an  
16 intentional breach.

17           Now, as I already noted, the record here  
18 doesn't show intent to harm Methanex or to cause  
19 the specific harm that's alleged. Under classic  
20 principles of proximate causation, therefore, the  
21 chain of causation is too indirect to impose state

1 responsibility, but, as my colleague, Mr. McNeil,  
2 will demonstrate in a few moments, even if  
3 Methanex's claims were not remote, they would still  
4 fail for lack of evidence of any loss at all caused  
5 by the breach.

6           I would like to conclude my presentation  
7 by addressing Methanex's contention that the  
8 undated, unsigned contract with Valero that I  
9 referenced this morning establishes proximate  
10 causation. It establishes precisely the opposite.  
11 It is clear from that contract that the party  
12 directly affected by a ban of the use of MTBE in  
13 California gasoline would be Valero, the party that  
14 produced California gasoline containing MTBE. It,  
15 that is, Valero, would have a lesser demand for  
16 MTBE as a results of the ban. Because it would  
17 need less MTBE, it would buy less methanol as a  
18 feedstock for MTBE production. Methanex, a  
19 supplier of methanol, would be impacted by the ban  
20 only as a result of its impact on its contractual  
21 counterparty. This is precisely the scenario that



1 the international case law authorities collected in  
2 our briefs have held not to satisfy the requirement  
3 of proximate causation.

4 I have a quote from the Tribunal in the  
5 Dickson Car Wheel case on the screen now which  
6 summarizes the holding of these cases. Quote, A  
7 state does not incur international responsibility  
8 from the fact that an individual or company of the  
9 nationality of another state suffers a primary  
10 injury as the corollary or result of an injury  
11 which the defendant's state has inflicted upon an  
12 individual or company, irrespective of nationality,  
13 when the relations between the former and the  
14 latter are of a contractual nature.

15 I would note that paragraph 225 of the  
16 Amended Statement of Defense provides a number of  
17 other examples of cases directly supporting this  
18 point.

19 The Valero contract is, if it were ever  
20 signed, evidence of a contractual relation with  
21 Methanex. The primary impact of the measure would

1 fall on Valero. Any impact on Methanex would only  
2 be a corollary or result of the impact on Valero.  
3 There is, under established international law  
4 recognized by these cases, no international  
5 responsibility here.

6 Unless, the Tribunal has any questions on  
7 the causal chain or the principle of proximate  
8 causation, I would turn the floor over to  
9 Mr. McNeil.

10 PRESIDENT VEEDER: Thank you very much,  
11 Mr. Legum. We have no questions at this stage. We  
12 hand the floor to Mr. McNeil.

13 MR. MCNEILL: Thank you.

14 Mr. President, members of the Tribunal, as  
15 Mr. Legum mentioned, I will be addressing  
16 Methanex's failure to prove any loss or damage in  
17 this case. I will demonstrate the record in this  
18 arbitration lacks any evidence of any loss to  
19 Methanex or its U.S. investments as a result of the  
20 California ban.

21 This lack of evidence is easy to explain.

1 There is no loss. In fact, Methanex has repeatedly  
2 told its investors and the public that it has not  
3 been affected by the California ban. As recently  
4 as February of this year, Methanex's CEO told  
5 investors that the ban has, and I quote, really had  
6 no impact on our industry. That is at 25 JS tab 2,  
7 and I will return to that later.

8           Even without these admissions of no loss,  
9 it is clear from the factual record in this case  
10 that Methanex and its U.S. investments have not  
11 been adversely affected by the ban. The record  
12 shows that Methanex's methanol plant in Fortier,  
13 Louisiana, was closed before the ban was even  
14 announced and was kept idle for economic reasons  
15 having nothing to do with the ban. The record also  
16 shows that Methanex's marketing operation in  
17 Dallas, Texas, Methanex-U.S. suffered no loss of  
18 goodwill or market share as a result of the ban,  
19 and was, in fact, a thriving and profitable  
20 operation during the relevant period.

21           The record showing an alleged decline in

1 Methanex's exports from Canada to California  
2 occurred years before and was unrelated to the  
3 California ban, and in any event, is not a claim  
4 that can be submitted under the investment chapter  
5 of the NAFTA.

6           And finally, the record shows that a  
7 temporary decline in Methanex's stock price, long  
8 prior to the ban taking effect, is not attributable  
9 to the ban, but more importantly, cannot be a legal  
10 matter--cannot as a legal matter serve as the basis  
11 for a claim of loss to the corporation. Methanex's  
12 failure to prove any loss or damage caused by the  
13 measures requires dismissal of all of its claims.

14           I will briefly review the requirements  
15 under the NAFTA. I will then review Methanex's  
16 admissions that it has no loss. Finally I will  
17 demonstrate that each of Methanex's damage claims  
18 with respect to its investments, with respect to  
19 Methanex-Fortier, Methanex-U.S., and also with  
20 respect to its stock price, fail for lack of  
21 evidence.

1           First, let's look at the requirements  
2 under the NAFTA. Kindly draw your attention to the  
3 first slide. NAFTA Articles 1116 and 1117 require  
4 as an element of a claim that an investor  
5 demonstrate that it, quote, has incurred loss or  
6 damage by reason of or arising out of an alleged  
7 breach. The text, you will notice, is phrased in  
8 the past tense. It requires that a claimant  
9 produce evidence of an existing loss. As one NAFTA  
10 Tribunal has held the failure to produce evidence  
11 that an actual loss has been occurred is fatal to a  
12 claim of liability. In ADF versus United States,  
13 the Tribunal dismissed certain of ADF's claims  
14 because the claimant failed to produce any evidence  
15 that it had incurred an actual loss.

16           As here, the quantum of damages was  
17 reserved for a later phase in the proceedings. And  
18 that case is at Tab 2 in the U.S. Amended Statement  
19 of Defense. As I will demonstrate, the same result  
20 is called for here.

21           I will now address Methanex's statements

1 to its shareholders and to the public that it has  
2 suffered no loss from the California ban. The  
3 first example is from Methanex's earnings  
4 conference call for the second quarter 2002.

5 Kindly draw your attention to the screen.

6 As you can see in that call, Methanex's  
7 CEO, Pierre Choquette, stated that, quote, We don't  
8 expect the impact of this change--referring to  
9 California refiners no longer purchasing  
10 methanol--to have much of an impact on pricing, if  
11 any at all--and by "pricing," Mr. Choquette was  
12 referring to methanol pricing.

13 In the next slide, there is a quotation  
14 from the same conference call. As you can see  
15 Mr. Choquette likewise stated that, quote, It,  
16 referring to the loss of California MTBE market,  
17 just happens to be coming at a time--

18 MR. DUGAN: Can I register an objection?  
19 He is reading into what Mr. Choquette is saying.  
20 Mr. Choquette's not a witness here, and he has  
21 never put anything into the record.

1           PRESIDENT VEEDER: I think it is a  
2 function of counsel in making submissions to a  
3 Tribunal on the existing material before the  
4 Tribunal.

5           MR. DUGAN: We don't know what that  
6 Mr. Choquette actually intended what they say he's  
7 intended.

8           PRESIDENT VEEDER: Are you objecting to  
9 the previous interpolation?

10          MR. DUGAN: Yes, I'm objecting to the  
11 interpolations. I think he has to have the  
12 language up just as it was said.

13          PRESIDENT VEEDER: Well, I think we can  
14 take the interpolations on board. You have a  
15 reply, and you can make comments that you're minded  
16 to make. But we understand, I think, what is  
17 happening is that counsel is going to primary  
18 material and adding something to it, which I think  
19 is the function of counsel.

20          MR. MCNEILL: To return to this quote, as  
21 Methanex's CEO Pierre Choquette stated, Clearly in

1 the market we are in today, if the conversion in  
2 California took place overnight, it would be fully  
3 absorbed.

4 Methanex's earnings conference call for  
5 the first quarter of 2003, as you can see on the  
6 screen, Methanex's CEO stated, and I quote, The  
7 reduction in consumption--referring to MTBE  
8 consumption--in the United States, is taking place,  
9 but, of course, it is overshadowed by supply  
10 constraints, so it is hard to see the impact of the  
11 reduction, close quote.

12 And here is a statement made by  
13 Mr. Choquette, Methanex's CEO, at an investor  
14 conference in Canada in June 2003. At that  
15 conference Mr. Choquette stated that, quote, I  
16 always like to say that I wish they would eliminate  
17 it--referring to MTBE--from the U.S. market  
18 tomorrow morning, so we can get on with life,  
19 because it is not that big a deal, close quote.

20 Finally, as you can see on the screen, at  
21 an investor conference in February of this year,



1 Bruce Aitken, Methanex's President and now CEO,  
2 stated that, quote, We have already had big  
3 reductions in MTBE demand in the U.S., and it's  
4 really has had no impact on our industry, close  
5 quote.

6           We don't expect an impact on pricing if at  
7 all. It is unlikely to have any significant  
8 impact. It would be fully absorbed. It is hard to  
9 see the impact of the reduction. It is not that  
10 big a deal. And it has really had no impact on our  
11 industry.

12           The timing of this latter statement in  
13 February of 2004--February of this year, is  
14 particularly significant. MTBE, as Mr. Aitken  
15 notes, had already declined significantly across  
16 the United States. As you can see from Methanex's  
17 Exhibit 7, which we have up on the projection  
18 screen, it is not in your packets, we discussed  
19 this slide this morning, you can see from the blue  
20 line that demand for methanol, for MTBE in the  
21 California market, had been fully--had completely

1 disappeared by 2004. You can see by the beginning  
2 of 2003, it was almost completely out of the  
3 market, but by 2004, it had been completely phased  
4 out.

5           Thus, if there is to be any effect on  
6 Methanex from the California ban, it would  
7 certainly have been felt by the time Methanex's  
8 President made this statement in February of this  
9 year.

10           Methanex has no explanation for the  
11 discrepancy between these statements that it has no  
12 loss, and its damage claims in this case. Methanex  
13 has nearly a \$1 billion damage claim, which is  
14 approximately the value of the entire company,  
15 suggests not just a severe loss but a catastrophic  
16 loss. Methanex offers no explanation because it is  
17 impossible to reconcile these two things.

18           Methanex's response to these admissions of  
19 no loss is to claim that they must have been taken  
20 out of context. The citation in the record for  
21 each statement is at the lower right-hand corner of

1 the handouts. We invite the Tribunal members to  
2 see for themselves that in their full context,  
3 these statements mean exactly what they say, and I  
4 include the statement that Mr. Dugan referred to  
5 earlier about methanol pricing.

6           The only statement that Methanex actually  
7 addresses in substance, and that Methanex mentioned  
8 yesterday, is the one from mid-2003, that the  
9 elimination of MTBE across the entire United States  
10 would not be that big a deal. Notably Methanex  
11 does not refute that Methanex had no loss as of  
12 that date. Rather, in the third Macdonald  
13 affidavit Methanex expressly confirms that it had  
14 no loss. The statement is on the screen.  
15 Mr. Macdonald stated, paragraph 35, quote, By  
16 mid-2003, the methanol market had changed for the  
17 better, and supply and demand were in a balance to  
18 tight situation. Because of the strong price, the  
19 immediate damage of the MTBE ban was not felt,  
20 close quote.

21           This is a remarkable admission. Methanex

1   concedes that four years after commencing this  
2   arbitration, it still had not felt a loss from the  
3   MTBE ban. Methanex's damage claim thus boils down  
4   to this. It argues that it is only because of the  
5   tight market situation and high methanol prices  
6   that it has no injury. If market conditions were  
7   different, or if they change sometime in the  
8   future, Methanex suggests, perhaps it might have a  
9   loss.

10           Mere hypothetical losses or mere  
11   speculation about possible future losses cannot be  
12   the basis for a claim under Articles 1116 and 1117  
13   of the NAFTA. Those articles require that a  
14   claimant demonstrate an actual, existing loss.  
15   Methanex's admissions that it had no existing loss  
16   by themselves are fatal to Methanex's claims.

17           In the remainder of my presentation, I  
18   will address the factual record in this case with  
19   respect to each of Methanex's damage claims. I  
20   noted moments ago that it was not possible to  
21   reconcile Methanex's admissions of no loss with its

1 damage claims. Those admissions are, however, easy  
2 to reconcile with one thing in this case, the  
3 evidentiary record, for that record shows exactly  
4 what Methanex's CEO, President, and now its Senior  
5 Officer, Michael Macdonald, have all said: The ban  
6 has had no impact on Methanex.

7 I will first address Methanex's claim with  
8 respect to its plant in Fortier, Louisiana. I'll  
9 then discuss its claims with respect to  
10 Methanex-U.S., its marketing in Dallas, Texas, and  
11 finally I'll address Methanex's claim based on its  
12 stock price and its debt rating.

13 As you heard yesterday, Methanex alleges  
14 in this case the ban injured its methanol plant in  
15 Fortier, Louisiana. Methanex converted that plant  
16 from an idle ammonia factory in 1994. It ran that  
17 plant for only four and a half years, and it closed  
18 it down in March 1999, before the California ban  
19 was even announced.

20 In assessing the Fortier claim, it is  
21 helpful to bear in mind some important facts about

1 the U.S. methanol industry. Methanol is made  
2 primarily from natural gas, which in the North  
3 American market constitutes up to 90 percent of the  
4 production cost of methanol. The Fortier plant's  
5 natural gas costs were significantly higher than  
6 those in Chile or Trinidad where Methanex has  
7 several methanol plants.

8           If I may draw your attention again to the  
9 screen, as you see from this chart, in 1999, for  
10 example, natural gas costs at the Henry Hub in  
11 Louisiana, where Fortier obtained its natural gas,  
12 were around \$2.25 for a million BTUs, for a million  
13 units, more than four times the 50 cents for a  
14 million units in Chile. The Fortier plant's  
15 natural gas costs were also higher than those for  
16 Methanex's Canadian plants, all of which,  
17 incidentally, closed due to their high natural gas  
18 costs.

19           The chart on the screen now is from  
20 Methanex's 1997 annual report. As you can see on  
21 the far right of this chart, natural gas costs at

1 the Henry Hub where Fortier was located were \$2.47  
2 for 1996. It's more than two and a half than the  
3 price for Methanex's plants in Medicine Hat. For  
4 1997, it is the same story. You see the natural  
5 gas costs were \$2.45 in 1997, almost double the  
6 costs at Medicine Hat and significantly higher than  
7 the natural gas costs from Methanex's plant in  
8 Kitimat, British Columbia.

9           The Fortier plant could not operate  
10 profitably with such high input costs. Methanex  
11 ran its plant well below its capacity, as low as 50  
12 percent in 1998, and by comparison, Methanex ran  
13 its methanol plants worldwide at an average rate of  
14 between 96 and 98 percent over the last several  
15 years. Methanex shut the plant down in 1999  
16 because it was losing money. As Methanex stated in  
17 its 1999 annual report, you can see on the screen,  
18 Methanex estimated that it saved approximately \$9  
19 million per year while the Fortier plant remained  
20 idle.

21           On this next slide, there is a quote from

1 Methanex's Senior Officer, Michael Macdonald. At  
2 the time of the Fortier closing Mr. Macdonald  
3 explained, referring to Fortier, quote, We are not  
4 making money there. In fact, we are hurting. If  
5 it were within our control, we would have had the  
6 plant down earlier, close quote.

7           To be clear, Methanex's claim is not that  
8 it closed the Fortier plant because of the  
9 California measures; rather, it claims that the  
10 measures contributed to its decision to keep the  
11 plant closed. In other words, Methanex suggests  
12 that it might have reopened the plant and run it  
13 profitably but for the ban. Methanex, however,  
14 provides no documentary evidence for this  
15 speculative claim. This is a remarkable admission,  
16 given that such a major corporate decision would  
17 surely be reflected in Methanex's corporate  
18 documents.

19           Rather, as we saw yesterday, Methanex  
20 relies exclusively on a single line in its 2002  
21 annual report warning, in boilerplate language,



1 that an MTBE ban across the entire United States  
2 could affect its North American operations,  
3 including its Fortier plant. Methanex's evidence  
4 is at 19 JS tab 2.

5           Mere speculation as to possible future  
6 events, as I noted, does not establish that  
7 Methanex has incurred a loss as required by Chapter  
8 11. Furthermore, It is hard to see how  
9 Methanex--excuse me--furthermore, it hard to see  
10 how the California ban could have had any material  
11 effect on the Fortier plant, let alone the decisive  
12 effect alleged by Methanex.

13           First, there is no evidence of record that  
14 Fortier ever supplied methanol used to produce MTBE  
15 for California gasoline. On this next slide, there  
16 is a map from Methanex's 1999 annual report. You  
17 can see the Fortier plant located in Louisiana near  
18 the Gulf of Mexico. The Fortier plant served  
19 customers in the southeastern United States and  
20 along the Mississippi River, that predominantly  
21 produced chemical derivatives, not MTBE. If you

1 look at the small arrow just to the left of center  
2 of this map, you can see that the California market  
3 was served instead by Methanex's plant in Kitimat,  
4 British Columbia in Canada. It is difficult to see  
5 how an MTBE ban in California could impact a plant  
6 in Louisiana that never served the California  
7 market.

8           Second, there is no evidence that the  
9 measures indirectly injured the Fortier plant by  
10 lowering the global price of methanol, as Methanex  
11 contends. In fact, let's be clear: Methanex has  
12 admitted that there was no such effect on the  
13 global price of methanol. I showed you this slide  
14 previously. Methanex's CEO stated in 2002,  
15 earnings conference call, quote, We don't expect  
16 the impact of this change, referring again to  
17 California refiners, no longer purchasing ethanol,  
18 to have much of an impact on pricing, if any at  
19 all. And again, by pricing Mr. Choquette was  
20 referring to methanol pricing.

21           Furthermore, there is no evidence that the

1 ban caused any depression in the global price of  
2 methanol. To the contrary, methanol prices have  
3 increased substantially since 1999. If I may draw  
4 your attention again to the screen, as you can see  
5 from this chart, based on data from Methanex's 2003  
6 annual report, Methanex's average realized methanol  
7 price in 1999 was about \$105 per metric ton. By  
8 2003, that had more than doubled to about \$220 per  
9 metric ton, and it remains at about that level  
10 today. So it is hard to see how Fortier was  
11 supposedly injured by low methanol pricing as  
12 Methanex contends.

13           Finally, as a factual matter, Methanex's  
14 claim that it would have reopened Fortier is  
15 implausible as well as speculative. Methanex has  
16 for years been telling its investors of its  
17 relentless drive to lower production costs by  
18 withdrawing its production from the North American  
19 market. In fact, this is what Methanex said when  
20 it took a write-off on the Fortier plant in 2002.  
21 I draw your attention to the screen. Quote, The

1 Fortier plant has been mothballed since March 1999.  
2 The write-off of the Fortier facility reflects our  
3 low-cost strategy of reducing our reliance on North  
4 American production by expanding our production  
5 capacity in Trinidad and Chile. No mention is made  
6 of the California ban as a factor in the decision  
7 to write off the Fortier plant.

8           More importantly, Fortier's natural gas  
9 prices, which as I noted were already high in 1999,  
10 only increased substantially thereafter. As you  
11 can see from this chart from Methanex's 2002 annual  
12 report, natural gas prices at the Henry Hub near  
13 Fortier more than doubled around \$2.25 for a  
14 million units to around \$6. Today that price is  
15 nearly triple the 1999 price at around \$6.50. And  
16 I will draw your attention to the yellow line at  
17 the bottom of this chart. That represents  
18 Methanex's average natural gas costs at around \$1.

19           In other words, as of 2002, Methanex had  
20 the option of producing methanol based on natural  
21 gas at a dollar or less in Trinidad or Chile, or it

1 could have reopened the Fortier plant at a  
2 substantial cost, and produced methanol from  
3 natural gas at \$6 or more.

4           U.S. natural gas prices not only increased  
5 after 1999, they also became increasingly volatile,  
6 making it in the words of one industry leader,  
7 quote, virtual impossible, end quote, to produce  
8 methanol in North America, and that is at 16 JS tab  
9 48 at 1420.

10           If in 1999 the Fortier plant was, to use  
11 Methanex's words, hurting economically. It appears  
12 highly doubtful it would have fared any better  
13 thereafter had it been reopened. As we saw  
14 methanol prices increased after 1999, the increase  
15 was not nearly enough to offset the far greater  
16 increases in the cost of natural gas.

17           In sum, Methanex has failed to produce any  
18 evidence showing that the measures caused any loss  
19 or damage to its closed Fortier plant. Its  
20 unsupported and speculative contention that it  
21 might have reopened that plant and somehow run it

1 profitably falls far short of its evidentiary  
2 burden under Chapter 11.

3           Next, I will address Methanex's claim with  
4 respect to Methanex-U.S.'s goodwill, customer base,  
5 and market share.

6           The record in this arbitration lacks any  
7 competent evidence of Methanex-U.S.'s goodwill.  
8 Methanex told us yesterday that it purchased two  
9 customer lists in 2002, one for \$25 million, and  
10 one for \$10 million. That is at page 202 of the  
11 transcript. That is not evidence of Methanex's  
12 goodwill. And the lists allegedly purchased in  
13 2002, well after the ban was announced. Any effect  
14 on those customer lists from the California ban,  
15 and there is no such evidence, would have been  
16 anticipated at the time of purchase. Methanex, in  
17 fact, does not demonstrate at all how  
18 Methanex-U.S.'s goodwill was supposedly affected by  
19 the California measures. This failure of proof by  
20 itself is fatal to Methanex's goodwill claim.

21           Furthermore, Methanex's testimony shows

1 that Methanex-U.S.'s business was thriving after  
2 the ban was announced. For example, according to  
3 the third Macdonald affidavit, Methanex's revenues  
4 increased from \$228 million in 1999, to over \$300  
5 million in 2002. That is at the third Macdonald  
6 affidavit paragraph 14, 19 JS at eight.

7           And Methanex-U.S.'s profitability remained  
8 basically unchanged during that period. It is thus  
9 difficult to understand as a factual matter how  
10 Methanex-U.S.'s intangible assets were supposedly  
11 severely impaired. Methanex sheds no light on this  
12 mystery.

13           Next, I will address Methanex's claims  
14 concerning a loss of the California MTBE market.  
15 On the screen you can see a chart we created based  
16 on Methanex's export figures for the California  
17 market. I will ask you to focus for now just on  
18 the dotted line. I will return to this chart a  
19 little later and describe the other information in  
20 the chart. The dotted line is a graphical  
21 representation of evidence provided by Methanex in

1 the second Macdonald affidavit. The line  
2 represents Methanex's exports from Kitimat, British  
3 Columbia in Canada, to California, and it shows  
4 exports declining from around 132,000 metric tons  
5 in 1998, to a little more than 50,000 metric tons  
6 by 2001. This is Methanex's evidence that it lost  
7 a valuable market as a result of the ban. This  
8 evidence fails to establish any loss to Methanex  
9 for several reasons.

10 First, as a matter of law, such a claim  
11 cannot establish a breach under Chapter 11 of the  
12 NAFTA, which pertains solely to investments in the  
13 territory of the respondent party, not to trade and  
14 goods. These sales figures given by Methanex  
15 represent cross border trade in goods. Trade in  
16 goods is expressly excluded from ambit of Chapter  
17 11 and is covered in other chapters of the NAFTA.  
18 This reason alone is sufficient to dismiss  
19 Methanex's claims.

20 Second, there is a critical distinction  
21 between revenues and profits. Looking at the



1 dotted line, the decrease in Methanex's exports as  
2 shown here only tells us what happened to  
3 Methanex's revenues with respect to the California  
4 market. The record is silent as to any lost  
5 profits as a result of the ban. And, in fact, it  
6 is highly doubtful that the California market was  
7 profitable for Methanex. As I pointed out on the  
8 map I showed you earlier, Methanex exported  
9 methanol to California from its plant in Kitimat,  
10 British Columbia. Methanex closed that plant in  
11 mid-2000 because it was losing money. Let me draw  
12 your attention again to the screen. This is what  
13 Methanex stated in its May 2000 press release. The  
14 Kitimat methanol plant has been losing substantial  
15 sums of money for some time primarily due--there's  
16 a typo there--primarily due to very high natural  
17 gas costs.

18           Furthermore, Methanex has not even alleged  
19 that it had a net decrease in revenues. Rather,  
20 Methanex concedes that it simply sold any methanol  
21 it would have sold in California elsewhere. As you

1 can see from this quote on the screen, from the  
2 third Macdonald affidavit, Mr. Macdonald states  
3 that, quote, After the California ban was  
4 announced, Methanex largely moved its sales out of  
5 the California MTBE sector and restructured its  
6 sales to other U.S. MTBE producers.

7           Furthermore, in the very tight market  
8 conditions prevailing in 2002 and 2003, Methanex  
9 was running its plants at very close to full  
10 capacity. In fact, Methanex was struggling to meet  
11 its existing contractual commitments and could only  
12 do so by purchasing additional methanol on the spot  
13 market at a considerable loss. As Methanex's CEO  
14 described the situation to the company shareholders  
15 in early 2003, quote, and I have the quote up on  
16 the screen, We currently are on order control. In  
17 other words, Methanex wasn't able to accommodate  
18 more orders for methanol. Thus, while Methanex's  
19 sales may have shifted from one market to another,  
20 there was no net decrease in revenues and no  
21 production capacity that went unused as a result of

1 the California ban.

2           Finally, the record belies Methanex's  
3 contention that it exported less methanol to  
4 California because of the California ban.

5           Let's return for a moment to the chart  
6 with Methanex's export figures. That is slide 22  
7 in your packets.

8           You can see that the alleged decrease in  
9 exports, represented again by the dotted line,  
10 occurred years before the California measures took  
11 effect. In providing these numbers, Methanex  
12 presumably was suggesting that the California MTBE  
13 market was shrinking during those years due to the  
14 ban. The United States' expert, Dexter Miller, a  
15 leading expert in analyzing gasoline and MTBE  
16 markets, analyzed what was in fact happening with  
17 MTBE banned in California during those years. His  
18 conclusion is represented by the green bars on this  
19 chart.

20           Mr. Miller's data shows that demand was,  
21 in fact, increasing in those years. There is,

1   thus, no causal relationship between what was  
2   happening in the California MTBE market and  
3   Methanex's decision to export less methanol to that  
4   market.

5           Methanex has not disputed Mr. Miller's  
6   data. As a matter of fact, Methanex has not  
7   referenced Mr. Miller at all. Instead, Methanex  
8   alleges, again, without any evidence, that it  
9   simply was mitigating its damages by withdrawing  
10   from the California market. We submit that  
11   Methanex's contention that it was mitigating  
12   damages by withdrawing from a growing market years  
13   before the ban is simply implausible.

14           The far more likely explanation is that  
15   Methanex exported less methanol to California  
16   because it was losing money on every gallon of  
17   methanol it produced at its money-losing plant in  
18   Kitimat, British Columbia, and sold into that  
19   market.

20           As a final note, while we have this chart  
21   in front of us, I would just like to give you a

1 sense of the size of the methanol market at issue.  
2 Methanex has labored to create the impression in  
3 this case that it lost an enormous and valuable  
4 market. For instance, Methanex yesterday stated  
5 that, quote, California, in and of itself, is a  
6 very big market. It is one of the biggest markets  
7 for methanol in the world because it is a huge  
8 economy, and the market for MTBE in California  
9 itself is a very big market. So, the loss of the  
10 market, in and of itself, is a big loss for a  
11 company like Methanex, and that is at pages 204 and  
12 205 of the transcript. Methanex also noted at page  
13 140 of the transcript that the California ethanol  
14 market was about \$1.8 billion. The impression that  
15 Methanex seeks to create is false.

16           As you see from this chart, Methanex  
17 alleges that it sold 50,000 metric tons of methanol  
18 in 2001. Methanex did not provide any data after  
19 2001, so these are the most recent figures we have.  
20 How much is that market worth to Methanex? Well,  
21 Methanex sold approximately 7.4 million metric tons

1 of methanol that year, so the California market at  
2 issue was less than one percent of Methanex's  
3 global sales. It was around 0.7 percent. In  
4 dollar terms, that market was less than \$9 million  
5 in revenue, and more importantly, the market was  
6 not profitable. From this perspective, it is easy  
7 to see why Methanex has been telling its investors,  
8 it's been telling its shareholders, for years, that  
9 it has not felt any impact from the loss of the  
10 California MTBE market, and the California ban is  
11 no big deal.

12           Finally, I will address Methanex's stock  
13 price and credit rating claims. As you heard  
14 yesterday, Methanex alleges that its average stock  
15 price declined about 20 percent in early 1999.  
16 Methanex also alleges injury based on the downgrade  
17 of its long-term credit rating, also in early 1999.  
18 These claims are without merit for the following  
19 reasons: First, with respect to the stock price  
20 claim, Methanex points to no case in which an  
21 international Tribunal has awarded damages based on

1 its radical theory that states are responsible to  
2 corporations for fleeting changes in the price of  
3 their shares. Such an event on its face is not a  
4 loss to the corporation. The corporation does not  
5 own stock in itself.

6 In fact, Methanex has previously stated  
7 that it does not base any claim on its share price.  
8 Let me draw your attention again to the screen. In  
9 paragraph 86, to its reply to the statement of  
10 defense from August of 2000, Methanex states,  
11 quote, Methanex's damage claim is not based on a  
12 loss of share value. Because Methanex has  
13 expressly disavowed any stock price claim in this  
14 case, it is unclear why Methanex continues to  
15 discuss it here.

16 Even if the Tribunal were to consider this  
17 allegation, however, it is without merit for  
18 several other reasons. First, there is a  
19 significant causation problem. The stock price  
20 change alleged by Methanex occurred years before  
21 the ban. Methanex said yesterday they didn't think

1 that was a problem. We think that presents a big  
2 problem to Methanex's claim. At best, a minor  
3 price movement years before the ban reflects  
4 investors' mere concern about the possible future  
5 effects on the company, an effect that Methanex has  
6 later confirmed time and time again to its  
7 shareholders did not occur.

8           In fact, nothing demonstrates the  
9 impossibility of attributing a temporary stock  
10 price movement to the ban more clearly than the  
11 fact that throughout this arbitration Methanex has  
12 been unable to settle on which stock price  
13 movements it seeks to use.

14           I have on the screen a chart showing  
15 Methanex's stock price from mid-1998 to the end of  
16 2000. In Methanex's reply to the U.S. Statement of  
17 Defense at paragraph six, Methanex alleged a  
18 one-day drop, on March 26, 1999, the day after the  
19 announcement of the ban. That is represented by  
20 the yellow line. That was the first iteration of  
21 Methanex's claim. In its Second Amended Statement



1 of Claim, Methanex decided, without explanation, to  
2 expand its claim to the ten-day period following  
3 the March 25 announcement. And that is represented  
4 by the red bar. That was Methanex's second  
5 iteration of its claim. Incredibly, yesterday,  
6 Methanex showed you a slide suggesting that they  
7 now base their claim on a seven-day period in  
8 January 1999, even before the ban was announced.  
9 That was Methanex's third iteration of its claim.

10 PRESIDENT VEEDER: Do you have a  
11 transcript reference?

12 MR. MCNEILL: It was Exhibit 73, and I  
13 don't have a transcript reference, but I can  
14 provide that.

15 It is clear that Methanex has no idea what  
16 price movements it thinks were actually caused by  
17 the ban. Methanex's stock price claim has other  
18 serious problems as well. Methanex showed us  
19 yesterday a number of analysts' reports suggesting  
20 concern over a nationwide MTBE ban that allegedly  
21 put downward pressure on Methanex's stock price.

1 Professor Reisman asked Methanex how it accounted  
2 for the contribution from California, and the  
3 contribution from the rest of the United States.  
4 Methanex's response, incredibly, was that it was  
5 claiming for all bans across the United States.  
6 California, says Methanex, is an, quote,  
7 environmental front runner and other U.S. state  
8 legislatures mindlessly follow California on  
9 environment matters. All the bans, says Methanex,  
10 should be laid at California's doorstep. And that  
11 is at page 206 of the transcript.

12           That proposition is, of course, absurd.  
13 The fact is, Methanex cannot separate out concern  
14 over California versus concern over what might  
15 happen in the rest of the country.

16           Furthermore, as you can see, the alleged  
17 periods of decline occurred during a significant  
18 downtrend in Methanex's stock price caused by the  
19 cyclical decline in methanol prices. In early  
20 1999, methanol prices were, in fact, at their  
21 lowest level in more than ten years. Methanex

1 offers no explanation of how it could possibly  
2 separate out any effects from concern over MTBE in  
3 California, from effects due to the historically  
4 low methanol prices.

5           Finally, as you can see, Methanex's stock  
6 price recovered fairly quickly to about \$12. This  
7 is \$12 Canadian, by the end of 2000. That price,  
8 as you can see, is higher than the stock price  
9 before the ban was announced.

10           Yesterday, Methanex's stock price was  
11 trading around \$17 on the Toronto exchange. The 20  
12 percent drop has thus been recovered many times  
13 over. Methanex does not explain how an alleged  
14 minor and temporary decline in 1999 could possibly  
15 be quantified today.

16           Finally, Methanex's claims with respect to  
17 the temporary downgrade in its long-term debt  
18 rating fail for many of the same reasons. First,  
19 Methanex points to no case in which an  
20 international Tribunal has awarded damages based on  
21 a temporary downgrade. Second, there is no basis

1 for attributing the downgrade solely or even  
2 primarily to the California measures.

3           Let's take a look at the 1999 Fitch IBCA  
4 report that Methanex showed you yesterday. That  
5 report directly refutes that the ban was the  
6 primary reason for the rating action. As you can  
7 see on the screen, that report states, quote, This  
8 rating action is primarily due to deterioration of  
9 methanol price caused by oversupply. In fact, this  
10 was the first line of the report. Methanex skipped  
11 over that first line and showed you a few snippets  
12 that dealt with MTBE.

13           Finally, Methanex is unable to produce any  
14 evidence that the corporation was actually injured  
15 by the downgrade. Rather, by Methanex's own  
16 admission, it is merely a hypothetical loss. This  
17 is what the third Macdonald affidavit says: The  
18 practical impact of the downgrades was to increase  
19 the cost of any new debt the company might have  
20 raised.

21           Notably Methanex offers no evidence to

1 suggest that it did, in fact, raise new debt at any  
2 relevant time, or that the downgrade had any  
3 adverse effect on the terms of that debt. Methanex  
4 cannot state a claim under Articles 1116 and 1117,  
5 based on hypothetical or speculative losses.

6 Those articles require actual existing  
7 losses. Because Methanex has not produced any  
8 evidence of actual existing losses and it has  
9 admitted that no losses exist, its claims, we  
10 submit, should be dismissed in their entirety.

11 If the Tribunal has any questions, I would  
12 be pleased to answer them. Otherwise, I will turn  
13 the matter over to Mr. Bettauer.

14 PRESIDENT VEEDER: Thank you very much.  
15 We have no questions at this stage.

16 MR. MCNEILL: Okay. May I just add that  
17 the citation you requested was page 213, lines nine  
18 through 19. That is related to tab 73 or Exhibit  
19 73, which I noted.

20 PRESIDENT VEEDER: Thank you very much.

21 MR. BETTAUER: Since it is late, I will

1 take two minutes and wrap up our presentation for  
2 today. The presentation on proximate cause has not  
3 been lengthy, and I don't intend to repeat it.  
4 Suffice it to say, in this part of our presentation  
5 we have established two additional grounds for  
6 dismissal of the case before us. First, Mr. Legum  
7 showed that the chain of causation in this case is  
8 an extraordinarily weak one. Methanex's claim  
9 depends upon the impact of the ban upon suppliers,  
10 to suppliers, to persons directly affected. The  
11 impact alleged here is far too remote to stand  
12 under established principles of international law.

13           Second, Mr. McNeil demonstrated that the  
14 record shows no loss to Methanex caused by the  
15 measures in any event. The Fortier plant was idle  
16 before the 1999 Executive Order and did not even  
17 serve the California market before it was idled.  
18 There is no evidence of record to support  
19 Methanex's implausible contention that it might  
20 have reopened the plant and run it profitably but  
21 for the ban.

1           With respect to Methanex-U.S., Methanex  
2 has provided no evidence of any loss of goodwill or  
3 market share. In fact, Methanex's own testimony  
4 demonstrates that Methanex-U.S.'s revenues have  
5 only increased since the ban was announced.  
6 Methanex's inability to demonstrate any loss or  
7 damage resulting from the California ban should  
8 come as no surprise. As Mr. McNeil pointed out,  
9 Methanex's senior officers have repeatedly  
10 represented to its investors and the public that  
11 the MTBE ban had no impact on the company.  
12 Methanex's failure to prove any loss caused by the  
13 measures by itself requires dismissal of all its  
14 claims.

15           Mr. President, this concludes our  
16 presentation for today. We will resume tomorrow  
17 morning by addressing each of Methanex's claims  
18 under Articles 1102, 1105(1), and 1110, as well as  
19 Methanex's failure to provide appropriate proof of  
20 ownership of investments in the United States.  
21 Thank you for your attention.

1           PRESIDENT VEEDER: Thank you. My  
2 colleague has, I think, one question to raise.

3           ARBITRATOR ROWLEY: Mr. Legum, this  
4 morning the President asked you with respect to the  
5 jurisdictional issue, which we have joined to the  
6 merits, whether we were to decide that on the basis  
7 of assuming the pleading to be true, and I believe  
8 you gave a provisional answer which I understood to  
9 be, no, we were to decide it on the evidence, not  
10 on the pleadings and you said you were going to  
11 consult further. First, have I understood your  
12 answer correctly, and secondly, have you consulted  
13 further, and are you in a position to speak to that  
14 point?

15          MR. LEGUM: I have, and the answer that I  
16 gave earlier stands. At least our understanding is  
17 that the procedure is that the jurisdictional issue  
18 has been joined to the merits; and therefore, as  
19 part of the merits, the Tribunal will address it  
20 based on the evidence that the parties have  
21 compiled, rather than based on assumptions and



1 inferences from lines in the pleadings. Of course,  
2 to the extent that the First Partial Award assumed  
3 facts that are consistent with the facts that have  
4 been demonstrated in the record, such as the  
5 competition between methanol as a feedstock and  
6 ethanol as a finished product, to the extent the  
7 Tribunal assumed facts and decided based on those  
8 assumed facts in a certain way, our view is that  
9 that is the binding law to the extent that the  
10 facts that have been proven turn out to be, as we  
11 believe they are, fully consistent with the facts  
12 that the Tribunal has assumed.

13 I hope that didn't add more confusion than  
14 enlightenment to the question.

15 ARBITRATOR ROWLEY: Thank you very much.

16 PRESIDENT VEEDER: We come to the end of  
17 day two, and as Mr. Bettauer has indicated, we will  
18 start again with the further oral submissions for  
19 the United States tomorrow morning.

20 Unfortunately, as you all know, we have  
21 another matter to deal with and we break now for

1 ten minutes and we will resume on the tenth floor  
2 for a further meeting in regard to this other  
3 matter. Thank you.

4 (Whereupon, at 5:41 p.m., the hearing was  
5 adjourned until 9:30 a.m. the following day.)

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## 1 CERTIFICATE OF REPORTER

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3 I, David A. Kasdan, RDR-CRR, Court

4 Reporter, do hereby testify that the foregoing

5 proceedings were stenographically recorded by me

6 and thereafter reduced to typewritten form by

7 computer-assisted transcription under my direction

8 and supervision; and that the foregoing transcript

9 is a true record and accurate record of the

10 proceedings.

11 I further certify that I am neither

12 counsel for, related to, nor employed by any of the

13 parties to this action in this proceeding, nor

14 financially or otherwise interested in the outcome

15 of this litigation.

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DAVID A. KASDAN, RDR-CRR

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21

1 CERTIFICATE OF REPORTER

2

3 I, Cathy Jardim, RPR, Court Reporter, do  
4 hereby testify that the foregoing proceedings were  
5 stenographically recorded by me and thereafter  
6 reduced to typewritten form by computer-assisted  
7 transcription under my direction and supervision;  
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14 of this litigation.

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CATHY JARDIM, RPR

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